

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1140

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1140

Bp/s

UNITED STATES OF AMERICA,

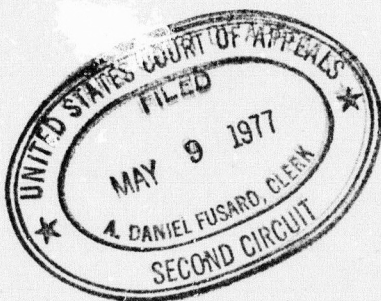
Appellee,

v.

EDWIN J. SCHULZ,

Appellant.

APPENDIX TO BRIEF
FOR APPELLANT EDWIN J. SCHULZ



DOUGLAS F. EATON

Attorney for Appellant
Edwin J. Schulz
745 Fifth Avenue
New York, New York 10022

Dated: May 9, 1977

PAGINATION AS IN ORIGINAL COPY

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NOTE: The complete text of the Indictment and the Court's Charge will appear in the Deferred Appendix of Appellants David and William Stirling.

APP. 1

CRIMINAL DOCKET U.S. DISTRICT COURT

FELTY OFFENSE TO: ☐
 MINOR OFFENSE MO: ☐
 MISDEMEANOR MO: ☐
 FELONY TO: ☒

JUDGE/MAGISTRATE Assigned: U.S.
 0845
 0208 1

SCHULZ, EDWIN J.

Case Filed: 07/27/76
 No. of Dets: 05
 76 0685 04

U.S. TITLE SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
15:77(q)a&x	Securities fraud.	1
15:77X	False registration.	2
18:1341	Mail fraud.	3-8
18:371	Consp. so to do.	9

U.S. MAG. CASE NO.
 AMT. ☐
 Denied ☐
 Set ☐
 \$ 000
 Date
 Bail Not Made ☐
 Status Changed (See Docket) ☐
 Conditions:
 10% Deposit ☐
 Surety Bond ☐
 Collateral ☐
 3rd Party Cust. ☐
 Other ☐

II. KEY DATES & INTERVIEWS

ARREST	INDICTMENT	ARRAIGNMENT	TRIAL
8-05-76	7-27-76	08-05-76	12-22-76
Summons served	Information	Not Guilty	Not Guilty
First Appearance			

SENTENCE: 3-11-77
 Disposition of Charge:
 Convicted ☒
 Acquitted ☐
 Dismissed ☐
 On Government's Motion ☐

MAGISTRATE		OUTCOME
Search Warrant	Issued ☐ Return ☐	DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW ☐
Summons	Issued ☐ Served ☐	
Arrest Warrant	Issued ☐ Served ☐	
COMPLAINT		
OFFENSE (or Complaint)		

U.S. Attorney or Asst

W. Cullen Mac Donald
791-0005

ATTORNEYS

DOUGLAS F. EATON
745 Fifth Avenue
New York, New York 10022
Tel: 759-1919

Defense: CJA ☐ Ret ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

Stirling, D.-1, Stirling, W.-2, Yanowitch-3., Phillips-5.

DATE	EVENTS	EXCLUDABLE DELAY (a) (b) (c)
7-27-76	Filed indictment.	
08-05-76	Def't. present (No Atty.) Court directs a not guilty plea be entered. Bail limits enlarged to include N.J. N.Y & Pa. Bail cont'd as fixed in the amount of \$15,000 P.R.B. Assigned to Frankel, J...Goettel, J.	
8-5-76	Filed Def't's Appearance Bond in the amount of \$15,000 unsecured dated 8-5-76.	
8-31-76	P.T.C. hold. Trial set for 12-13-76....FRANKEL, J.	
9-22-76	Filed Def't Schulz's motion for Bill of Particulars.	
09-29-76	Filed Gov't's Notice of Motion for an Order pursuant to Rule 16 of the F.R.C.P.	
09-29-76	Filed Gov't's Memorandum of Law in Support of it's Motion for Discovery and Inspection.	
09-29-76	Filed Gov't's Requests for a Bill of Particulars.	
09-29-76	Filed Gov't's Memorandum in Opposition to the Rule 7(f) requests by the Def't.	
10-12-76	Filed Def't's cja-23 Financial Affdvt.	

(Cont'd on Page #2)

APP. 2

OPPOSITE THE APPLICABLE CHECK ENTRIES BELOW IN SECTION V. ANY OCCURRENCE OF EXCLUDABLE DELAY PER TO USC § 3161(a)

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY			
			Interval Start Date End Date (a)	Start Date End Date (b)	Ex- clude Code (c)	Total Days (d)
10-15-76	Filed Deft's affdvt & Notice of Motion for an order to suppress & striking, as surplusage.					
10-15-76	Filed Deft's Memorandum of Law in support of the above motion.					
10-28-76	Filed affdvt of George J. Miller, Atty of the Philadelphia law firm of Dechert Price & Rhoads, in support of Deft's motion to suppress.					
11-01-76	Filed Responsive Affdvt of W. Cullen MacDonald, AUSA, in opposition to Deft's motion to suppress his Grand Jury testimony and certain other oral statements.					
11-01-76	Filed Gov't Memorandum in opposition to Deft's motion to suppress.					
11-01-76	Filed Answer of the United States to Deft. Schulz's motions under Rules 7(d)12(b)(2) and 14, F.R.C.P.					
11-03-76	Filed Govt. Affidavit and its attachment in accordance with pre-trial order herein entered.					
11/5/76	Filed Gov't Affidavit in response to Albert J. Gaynor's letter dated 11/3/76.					
11/5/76	Filed MEMORANDUM ORDER, the motion is resolves as follows: Suppression of Grand Jury denied, strike subparagraphs 7(1) & (2) from count Nine granted, strike words from paragraph 8, count one denied and strike or sever the mail fraud counts three thru eight will stand. So ordered Frankel, J. m/n.					
12-13-76	FILED dated 38-5-76					
12-13-76	FILED 10-1-76					
12-13-76	FILED 10-12-76					
12-21-76	Filed Deft's Notice of Motion for reconsideration of deft's motion to suppress his grand jury testimony, an order suppressing at least the four questions on deft's grand jury testimony, etc.					
12-21-76	Filed deft's Memorandum of Law in Support of Deft's Motions.					
12-21-76	Filed ORDER Subpoenas shall be issued for suces tecum of the people mentioned in this order. Ordered Frankel, J. m/n.					
12-21-76	Filed DEFT'S requests to charge.					
12-21-76	Filed Deft's Voir Dire questions.					
1-4-77	Filed ONE LARGE BROWN ENVELOPE to be sealed and impounded. So ordered FRANKEL, J.					
1-4-77	Filed ONE LARGE BROWN ENVELOPE to be sealed and impounded. So ordred FRANKEL, J.					
12-22-76	Jury Trial begins atty present.					
12-23-76	Trial Cont'd					
12-27-76	" "					
12-28-76	" "					
12-29-76	" "					

Continued on page 3

FILED	RECEIVED	FILED	RECEIVED

DATE	PROCEEDINGS
12-30-76	Trial Cont'd
1-3-77	" "
1-4-77	" "
1-5-77	" "
1-6-77	" "
1-7-77	" "
1-10-77	" "
1-11-77	" "
1-12-77	" "
1-13-77	" "
1-14-77	" "
1-15-77	" "
1-17-77	" "
1-18-77	" "
1-19-77	" "
1-20-77	" "
1-21-77	" "
1-22-77	" "
1-24-77	" "
1-25-77	" "
1-26-77	" "
1-27-77	" "
1-28-77	" "
1-29-77	" " & concluded. Jury returns a verdict of GUILTY on each of counts 1-thru 9. P.S.I. ordered. Sentence set for 3-11-77. Bail cont'd.
2-9-77	Filed transcript of record of proceedings, dated 12-20, 23, 27 & 28-76
2-9-77	Filed transcript of record of proceedings, dated 12-29, 30-76 & 1-3-77
2-9-77	Filed transcript of record of proceedings, dated 1-4, 5 & 6-77
2-9-77	Filed transcript of record of proceedings, dated 1-7, 10 & 11-77
2-9-77	Filed transcript of record of proceedings, dated 1-12, 13, 14 & 15-77
2-9-77	Filed transcript of record of proceedings, dated 1-17, 18 & 19-77
2-9-77	Filed transcript of record of proceedings, dated 1-20, 21 & 22-77
2-9-77	Filed transcript of record of proceedings, dated 1-24, 25 & 26-77
3-2-77	Filed transcript of record of proceedings, dated 11-8-76
3-11-77	Filed Deft's Affidavit of Douglas F. Eaton, to be part of the record on appeal.
3-11-77	Filed JUDGMENT ("77, 1977) and PROBATION/ACCOMMITMENT ORDER IMPOSITION OF PRISON sentence suspended. Deft placed on probation for a period of ONE (1) YEAR, subject to the standing probation order of the court. Deft fined \$2,500. on each of counts 1 thru 9 to run concurrently with each other, Fine is a committed fine and is to be paid within 30 days. Deft cont'd on present bail pending appeal. So ordered..... FRANKEL, J. All copies issued.
3-21-77	Filed DEFT'S Sentencing Memorandum.
3-21-77	Filed DEFT'S NOTICE OF APPEAL to the USCA from the Judgment dated 3-11-77. Mailed notices to US Atty and Counsel for Appellant.
3-25-77	Filed MEMORANDUM concerning copies and prices of transcripts, so ordered FRANKEL, J. m/n
3-28-77	Filed transcript of record of proceedings, dated 3-14-77

76 cr. 685 MF

[illegible]

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

WCMacD:d1

75-3888

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

APP. 5

July 8, 1976

George J. Miller, Esq.
Dechert, Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102

Re: Edwin J. Schulz

Dear Mr. Miller:

On the understandings specified below, the United States will accept a guilty plea from Edwin J. Schulz to one count of an Indictment charging a violation of 18 U.S.C. §371 and carrying a maximum sentence of 5 years imprisonment and a \$10,000 fine. If he fully complies with these understandings, Mr. Schulz will not be prosecuted by this Office for other existing charges known to this Office hereinafter specified, or for potential charges based upon information supplied to this Office by Mr. Schulz himself. Such immunity specifically includes charges related to securities, mail and wire frauds, perjury and false statements.

The understandings are that Mr. Schulz shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him, and, further, shall truthfully testify before the Grand Jury and/or at any trial or other court proceeding with respect to any matters about which this Office may request his testimony.



APP. 6

WCMacD:d1

George J. Miller, Esq.
Page Two

Re: Edwin J. Schulz

It is further understood that the sentence to be imposed upon Mr. Schulz is within the sole discretion of the sentencing Judge. This Office cannot and does not make any promise or representation as to what sentence Mr. Schulz will receive, nor will it recommend any specific sentence to the sentencing Judge. However, this Office will inform the sentencing Judge and the Probation Department of (1) this agreement; (2) the nature and extent of Mr. Schulz' activities with respect to this case; (3) the full nature and extent of Mr. Schulz' cooperation with this Office and the date when such cooperation commenced; and (4) all other information in its possession relevant to sentence.

It is further understood that this agreement is limited to the United States Attorney's Office for the Southern District of New York, and cannot bind other federal, state or local prosecuting authorities, although this Office will bring the cooperation of Mr. Schulz to the attention of other prosecuting offices, if requested.

It is further understood that Mr. Schulz must at all times give complete, truthful and accurate information and testimony and must not commit any further crime whatsoever. Should Mr. Schulz commit any further crimes or should it be judged by this Office that Mr. Schulz has given false, incomplete or misleading testimony or information, or has otherwise violated any provision of this agreement, this agreement shall be null and void and Mr. Schulz shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge, including, but not limited to, perjury and obstruction of justice. Any such prosecutions may be premised upon any information provided by Mr. Schulz, and such information may be used against him.

WCMacD:d1

APP. 7

George J. Miller, Esq.
Page Three

Re: Edwin J. Schulz

No additional promises, agreements and conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By: W. Cullen Mac Donald
W. CULLEN MACDONALD
Assistant United States Attorney

APPROVED:

Elihu Abramowitz
ELIHU ABRAMOWITZ
Chief, Criminal Division

AGREED AND CONSENTED TO:

*

EDWIN J. SCHULZ

APPROVED:

George J. Miller
GEORGE J. MILLER
Attorney for Edwin J. Schulz

cc: David Keegan, Esq.
1000 Franklin Ave.
Garden City, LI, NY

*** NOTE - SCHULZ AGREED
ALTHOUGH HE DID NOT SIGN.
SEE Tr. 2018-19, SCHULZ APP. 108-09.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APP. 8

-----x
UNITED STATES OF AMERICA, :
- against - : 76 Cr. 685 (MEF)
DAVID STIRLING, JR., et al., :
Defendants. : NOTICE OF MOTION
-----x

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Edwin J. Schulz, and upon an affidavit of George J. Miller, which will be submitted prior to the return date, and upon all the prior proceedings, the defendant Edwin J. Schulz will move before this Court on October 26, 1976 for an Order:

(1) pursuant to Rules 11(e)(6) and 12(b)(3), F.R. Crim.P., suppressing all statements made by Schulz to the Government and the grand jury from April 1976 through August 1976;

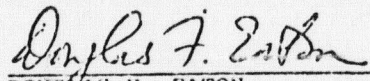
(2) pursuant to Rule 7(d), F.R.Crim.P., striking, as surplusage, paragraphs 7(1) and 7(2) of Count Nine;

(3) pursuant to Rule 7(d), F.R.Crim.P., striking, as surplusage, the following words in paragraph 8 of Count One: "Homex's shareholders, officers, directors and others including its auditors,"; and

(4) pursuant to Rules 12(b)(2) and 14, F.R.Crim.P., dismissing Counts Three through Eight or, alternatively, severing them.

Dated: New York, New York
October 15, 1976

Yours, etc.,


DOUGLAS F. EATON
Attorney for Defendant
Edwin J. Schulz
Suite 1909
745 Fifth Avenue
New York, NY 10022
759-1919

APP. 9

TO:

Hon. Robert B. Fiske, Jr.
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
Attention: W. Cullen MacDonald, Esq.

Albert J. Gaynor, Esq.
Attorney for Defendants David Stirling, Jr.
and William G. Stirling
202 Mamaroneck Avenue
White Plains, New York 10601

Sidney Fedushuh, Esq.
Attorney for Defendant
Harold M. Yanowitch
919 Third Avenue
New York, New York 10022

Patterson, Belknap & Webb
Attorneys for Defendant
Rubel L. Phillips
30 Rockefeller Plaza
New York, New York 10022
Attention: Michael B. Mukasey, Esq.

APP. 10

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SS. :

1. I am a defendant in this case, and I make this in support of my motion to suppress all statements from approximately April, 1976 through August, 1976.

3. I met with Assistant United States Attorney W. MacDonald and colleagues of his on at least four occasions. The dates were January 29, January 30, January 31, and February 20. Mr. MacDonald gave me the full "Miranda" warnings ^{of} on these occasions.

4. Some time later, I believe in March, 1976, Mr. MacDonald telephoned me and informed me that he had decided to recommend that I be indicted. I related this information to Mr. Miller, who instructed me that I should have no more conversations

with the government until Mr. Miller talked with Mr. MacDonald.

5. Later, I believe in April, 1976, Mr. Miller advised me that he had telephoned Mr. MacDonald and had failed to persuade him that I should not be indicted. Mr. Miller informed me that Mr. MacDonald wanted me to plead guilty and to be a witness for the government. Mr. Miller told me that I should not appear before the grand jury unless it was pursuant to an agreement with the government.

6. On May 12, 1976 Mr. Miller advised me that he had met with Mr. MacDonald on May 11 and that he had still failed to persuade Mr. MacDonald that I should not be indicted. He said that Mr. MacDonald wanted my testimony, especially against William Murray. He also said that if I could incriminate Mr. Murray, Mr. MacDonald would consider not prosecuting me. Mr. Miller told me that at this point he wanted me to have the advice of a lawyer who was familiar with criminal law.

7. On June 9, 1976 a United States Magistrate appointed David V. Keegan to represent me. On my behalf, Mr. Keegan negotiated with Mr. MacDonald as to what sort of an agreement the government was prepared to offer in return for my testimony. I joined in these discussions on some occasions, I believe on June 9 and June 21.

8. On July 3, 1976 Mr. Miller and I met with Mr. MacDonald. There were more plea negotiations. An agreement was proposed whereby I would testify before the grand jury and I would subsequently plead guilty to a conspiracy count on the basis of one incident. Mr. Miller and I tried to find out what other incidents would be charged against me in the indictment, but there was no resolution of this issue. I said that I would think over this proposed agreement. Mr. MacDonald emphasized

that he would be questioning Mr. Murray and/or his associates commencing on July 5, two days later, and that he needed more information about them from me. He showed me various work sheets that had been made by Mr. Murray and his associates, and I answered Mr. MacDonald's questions about them.

9. On or about July 12 I had a telephone conversation with Mr. Miller. He told me that he had received a letter from Mr. MacDonald which embodied the proposal previously made. Mr. Miller advised me to accept the proposal and to testify before the grand jury. He told me that in view of the agreement it would not be necessary for me to accompany me to the grand jury proceeding.

10. On the evening of July 15, I met with Mr. MacDonald. I read the letter agreement. The original was in the mail from Mr. Miller to Mr. MacDonald. On Mr. Miller's advice I agreed to the proposal. Mr. MacDonald told me that, as a Government witness, it would be in my best interests to admit that I had lied on previous occasions. I said that I did not believe that I had lied. He read me a few of my prior statements, but this did not change my opinion. There was no resolution of this issue. Mr. MacDonald asked me to try to give "Yes" or "No" answers before the grand jury. I appeared before the grand jury on July 16. At the outset Mr. MacDonald asked me the following questions:

"Q And you understand further that waiving that right and giving answers in the ordinary case, subjects the person giving the answers to the possibility that they can be used against him in a later criminal proceeding?

A Yes.

"Q You understand that under certain events, which I will describe in a moment, your answers today can be used against you in some later criminal proceeding as well?

A Yes.

Q So, when you make answers today and waive your right of silence, you appreciate the possibility that some day those answers can be used against you?

A Yes.

* * * * *

Q You understand that should you at any time in the course of your cooperation, give less than the whole truth by either an omission or deliberate false statement, that all of the immunity which you have been assured, falls away and you're subject to full prosecution for all of the offenses which I just referred to?

A Yes." (Emphasis supplied)

I thought that the only possibility that my answers could be used against me was in the event that I gave less than the whole truth, and that the Government then chose to withdraw the letter agreement. When I was before the grand jury, I simply never considered the possibility that I would withdraw my offer to plead guilty. From the commencement of plea negotiations in April 1976 until I ceased giving information to the Government, neither Mr. MacDonald nor anybody else told me that the Government might seek to use against me (a) my grand jury testimony, or (b) statements made by me during plea negotiations, in the event that I made a plea offer and then withdrew it.

11. The indictment was filed on July 27. Only then did I first begin to consider withdrawing my offer to plead

APP. 14

guilty. However, I continued to discuss the facts of this case with Mr. MacDonald during telephone conversations until some time in August 1976.

Respectfully submitted,

Edwin J. Schulz
EDWIN J. SCHULZ

Sworn to before me this

11th day of October, 1976.

Landra E. Starr
Notary Public

S. G. STEEL, INC. - PHILADELPHIA
1000 MARKET STREET, PHILADELPHIA, PA. 19106
MY COMMISSION EXPIRES MAY 3, 1979
Member, Pennsylvania Association of Notaries

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APP. 15

UNITED STATES OF AMERICA

- v -

DAVID STIRLING, JR., ET AL.

Defendants.

76 Cr. 685 (MEF)

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA

PHILADELPHIA COUNTY

SS.

GEORGE J. MILLER, being duly sworn, deposes as follows:

1. I am an attorney and a member of the Philadelphia law firm of Dechert Price & Rhoads. I represented Edwin J. Schulz during the investigations of Stirling-Homex Corporation conducted by the Securities and Exchange Commission and the United States Attorney's office. My practice is in the area of civil litigation. I had two types of previous experience with criminal cases. For three years I was an officer in the Judge Advocate General's office where I argued criminal appeals on behalf of the military prosecution. In addition, many years ago, I represented certain corporation executives in an anti-trust investigation by a Federal Grand Jury in Los Angeles.

2. I make this Affidavit in support of Mr. Schulz's motion to suppress all statements made by him to the government and the Grand Jury from approximately April, 1976 to August, 1976.

APP. 16

I am making this Affidavit after three conference telephone calls, totaling 3-1/2 hours, with Assistant United States Attorney W. Cullen MacDonald and Douglas F. Eaton, Mr. Schulz's present attorney. During these calls, Mr. MacDonald was allowed to consult my notes of my meetings and telephone conversations with him. Mr. Eaton and I have withheld, on the behalf of attorney client privilege, other documents which are my notes of my private conversations with Mr. Schulz. These notes reflect the facts in issue in this case and do not reflect the plea discussions pertinent to Mr. Schulz's motion.

3. After the Securities and Exchange Commission investigation, Edward Herlihy, the Securities and Exchange Commission attorney in charge of the investigation, advised me that he did not believe that Mr. Schulz should be prosecuted criminally, but that he intended to send the entire investigation file on Stirling-Homex to the United States Attorney. On December 3, 1975 I sent a letter to Mr. MacDonald, a copy is annexed to this Affidavit. On December 23, 1975 in a telephone conversation Mr. MacDonald told me that he wanted to interview Mr. Schulz. On January 20, 1976 he stated that his office would not decide whether or not Mr. Schulz would be indicted until the conclusion of their investigatory stage. (Yesterday Mr. MacDonald asked if he told me that before he would interview Mr. Schulz he would require an informal commitment that Mr. Schulz would testify before the Grand Jury. I did not recall any such statement.) On the same day, January 20, Mr. MacDonald sent me a letter. On January 28 I sent him a letter in reply. Copies of both letters are annexed to this Affidavit.

4. Some time later, I believe in March, 1976, Mr. Schulz advised me that Mr. MacDonald had telephoned him, after

several face-to-face meetings, and had informed him that the office had decided to recommend that he be indicted. I instructed Mr. Schulz that he should have no more conversations with the government until I talked with Mr. MacDonald. However, I understand that Mr. Schulz did telephone Mr. MacDonald on one or more occasions after this and prior to May 11. Mr. MacDonald telephoned me and asked me to stop Mr. Schulz's calls and this was finally accomplished after a conference call among Mr. MacDonald, Mr. Schulz and me.

5. In late March or early April, I telephoned Mr. MacDonald and unsuccessfully attempted to persuade him that Mr. Schulz should not be indicted. Mr. MacDonald informed me that he wanted Mr. Schulz to plead guilty and be a witness for the government.

6. I contacted Mr. Schulz and told him that he should not appear before the Grand Jury unless it was pursuant with an agreement with the government.

7. On May 11, 1976, I went to New York and met with Mr. MacDonald. He said that he wanted Mr. Schulz's testimony before the Grand Jury, especially against William Murray, a partner in Peat Marwick Mitchell & Co. He indicated that if Mr. Schulz could incriminate Mr. Murray, particularly with regard to certain land sales, he would consider not prosecuting Mr. Schulz.

8. Shortly after this, I had more telephone conversations with Mr. Schulz and Mr. MacDonald. At this point, Mr. MacDonald made it clear that Mr. Schulz would be indicted but that he still wanted Mr. Schulz's testimony. I made it clear that Mr. Schulz would not testify before the Grand Jury

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APP. 18

unless it was pursuant to an agreement for total immunity. Mr. MacDonald then said it would be necessary for Mr. Schulz to appear before the Grand Jury even if he intended to claim the fifth amendment privilege.

9. I told Mr. MacDonald that I wanted Mr. Schulz to have the advice of a lawyer who was familiar with criminal law. As a result, on June 9, 1976, a United States Magistrate appointed David V. Keegan to represent Mr. Schulz. I kept in contact with Mr. Keegan and Mr. Schulz. Mr. Keegan advised me that he was turning his efforts towards seeing whether a satisfactory plea agreement could be negotiated with Mr. MacDonald. Mr. Keegan and I discussed the considerations involved in negotiating a cooperation agreement, including the pre-sentence report, sentencing proceedings, whether the cooperation should occur before or after the Grand Jury proceedings, and the possibility of waiving indictment and pleading before the Judge sitting in Part I (a possibility that Mr. MacDonald eventually rejected). I had discussed many of these same matters with Mr. MacDonald. I have no recollection that Rule 11(e)(6) was mentioned in these discussions nor the possibility that Mr. Schulz might offer to plead guilty and then withdraw such an offer.

10. On Saturday, July 3, 1976, Mr. Schulz and I went to New York and met with Mr. MacDonald and there were more plea negotiations. An agreement was proposed whereby Mr. Schulz would testify fully before the Grand Jury and would subsequently plead guilty to a conspiracy count. Mr. Schulz made it clear that, at his guilty plea proceeding, he probably would admit guilt as to only one particular incident in the conspiracy count, but he assured the government that he would tell the truth, as he saw it, on any and all matters at such a proceeding. Mr. MacDonald said that such a guilty plea would be satisfactory

to him. Mr. MacDonald advised me that this proposed plea agreement would have to be put in writing. He showed me a model of such an agreement which was contained in a memorandum from the Chief of the Criminal Division. Mr. Schulz said that he would think over the proposed plea agreement. Meanwhile, Mr. MacDonald emphasized that he would be questioning Mr. Murray and/or his associates commencing on July 5, two days later, and that he needed more information about them from Mr. Schulz. He showed Mr. Schulz various documents that pertained to Mr. Murray and his associates and Mr. Schulz answered questions about them.

11. Subsequently, Mr. MacDonald sent me a written proposal of plea agreement in a letter dated July 8. I telephoned Mr. Schulz and advised him to accept the proposal and to testify before the Grand Jury. He agreed to follow my advice. I told him that in view of the plea agreement it would not be necessary for me to accompany him to the Grand Jury. I signed the plea agreement and mailed it back to Mr. MacDonald, but I understand that it arrived too late for Mr. Schulz to sign it.

12. In my telephone conversation with Mr. Schulz, I also referred to a telephone conversation I had recently with Mr. MacDonald. I mentioned that Mr. MacDonald had told me he was certain that Mr. Schulz had lied in previous testimony before the Securities and Exchange Commission and elsewhere. I discussed this with Mr. Schulz and we both stated our firm opinion that he had not lied on any previous occasions. I told Mr. Schulz that he should tell Mr. MacDonald that he had not lied.

13. Shortly after Mr. Schulz's Grand Jury appearance, he telephoned me at home. He advised me that Mr. MacDonald had asked him before the Grand Jury whether he had lied before the Securities and Exchange Commission and elsewhere, and that he had answered yes. I was completely surprised at this

turn of events. Mr. Schulz said he was very upset about his answer, because he continued to believe that he had not lied. I asked him why he had given this answer. He said that his future sentence was in Mr. MacDonald's hands and that he had felt he had to answer yes because Mr. MacDonald had made it clear that he felt the correct answer was yes.

14. Some time after the indictment was filed, Mr. Schulz advised me that he wanted to withdraw his offer to plead guilty.

15. I did not believe that the government would seek to use the statements made by Mr. Schulz in the course of the plea negotiations. I did not express that to Mr. MacDonald or Mr. Schulz. I did realize the possibility that the government could declare the plea agreement null and void if, in its judgment, Mr. Schulz gave false or incomplete information. Mr. MacDonald warned Mr. Schulz about that possibility, and it was set forth in the written plea agreement. However, that possibility never occurred. Instead, Mr. Schulz was the one who chose to withdraw from the plea agreement. This possibility was not discussed by anyone to my knowledge.

16. If it had been discussed, and if Mr. MacDonald had made clear his present position, I might well have advised Mr. Schulz not to enter into the plea agreement. I would have seen the agreement much more as an irrevocable step, and I would have worried more about two unknown factors: (a) whether Mr. Murray would be indicted, and (b) what incidents would be charged against Mr. Schulz in the conspiracy count and in the other counts.

17. I was not aware of Rule 11(e)(6) of the Federal Rules of Criminal Procedure. I was aware of Rule 408 of the Federal Rules of Evidence. However, at the time, I did not think about whether the July 3 meeting, or the other plea discussions, or the Grand Jury testimony, would be privileged if Mr. Schulz withdrew his offer to plead guilty. I was not focusing on that possibility. I was focusing on making a plea agreement.

18. Prior to January 28, I had advised Mr. Schulz that what he said to Mr. MacDonald could be used against him. Later, around late March or early April, I advised him to stop talking to Mr. MacDonald. Prior to the July 3 meeting, I did not give Mr. Schulz any further advice as to whether his statements in the course of the plea discussions could or could not be used against him.

Respectfully submitted,

/s/ George J. Miller

Sworn to and subscribed
before me this 25th day
of October, 1976.

Antoinette Gordon
Notary Public

My Commission expires:

ANTOINETTE GORDON
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires June 10, 1978

APP. 22

December 3, 1975

Collin McDonald, Esquire
United States Attorney
Criminal Division
Second District of New York
One St. Andrews Plaza
New York, NY 10007

Re: Stirling Homex Case

Dear Mr. McDonald:

I represent Edwin J. Schulz who was the Controller of Stirling Homex Corporation and who cooperated fully with the Securities Exchange Commission in its investigation of that corporation. I understand from a newspaper item that you may be reviewing the file with a view toward instituting a criminal prosecution.

I write you this letter to tell you that Mr. Schulz would be willing to cooperate with you in any prosecution which you may institute. If you have any questions as to whether or not Mr. Schulz should himself be prosecuted criminally, I would appreciate your talking to me about that. I am also sure that Ed Herlihy of the Securities Exchange Commission will tell you that Mr. Schulz cooperated fully with the Commission and is not the material for a criminal prosecution.

If someone other than you is in charge of this matter, would you be kind enough to pass this letter on to him with the request that he contact me in the event he desires to take any action with respect to Mr. Schulz.

Very truly yours,

George J. Miller

GJM:dmg

January 20, 1976

Mr. George J. Miller
Dechert, Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102

Re: Stirling Homex

Dear Mr. Miller:

Pursuant to our telephone conversation today, this letter is intended to memorialize the extent of my commitment to you and your client, Edwin J. Schulz.

It is our intention to defer any prosecutorial decisions until the conclusion of the investigatory stage. At this point, if we decide to recommend that Mr. Schulz be indicted we will advise you of that fact and afford you an opportunity to persuade us otherwise.

Accordingly, if Mr. Schulz elects to waive both his right to counsel and his privilege against self-incrimination, he does so without any understanding beyond the foregoing limited undertaking.

Very truly yours,

THOMAS J. CAHILL
United States Attorney

By: W. Cullen Mac Donald
W. CULLEN MACDONALD
Assistant United States Attorney
(212) 791-0005

January 28, 1976

APP. 24

GEORGE J. MILLER
DIAL: (212) 972-3456

W. Cullen MacDonald, Esq.
Assistant United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, NY 10007

Re: Stirling Homex - Edwin J. Schulz

Dear Mr. MacDonald:

I have your letter of January 20th which correctly states the extent to which you have committed yourself in our previous telephone conversations.

I do ask you, as a gentleman, to advise me if at any time during the course of your investigation you become persuaded that it will be necessary to seek an indictment against Mr. Schulz. I understand that you have made no commitment to do that and that your failure to honor my request will not be used by me or Mr. Schulz as a ground for any claim of prosecutorial misconduct.

Very truly yours,

George J. Miller
George J. Miller

GJM:dmg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APP. 25

UNITED STATES OF AMERICA,

-v-

DAVID STIRLING, et al.,

Defendants.

:

:

:

:

RESPONSIVE AFFIDAVIT

76 Cr. 685 (MEF)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

W. CULLEN MAC DONALD, being duly sworn, deposes
and says:

1. I am an Assistant United States Attorney in
the office of Robert B. Fiske, Jr., United States Attorney
for the Southern District of New York, and, as such, have
been assigned and am familiar with the above-captioned
matter.

2. This affidavit is submitted in opposition to
the defendant SCHULZ's motion to suppress his Grand Jury
testimony and certain other oral statements.

3. On or about December 5, 1975, I received
George J. Miller's December 3, 1975 letter, a copy of which
is attached hereto as Exhibit A.

4. During the period between December 5, 1975
and January 20, 1976, I had numerous telephone conversations
with George J. Miller. We repeatedly discussed his view
that SCHULZ had no real criminal exposure, that SCHULZ
would be, during both his Grand Jury appearance and

ancillary interviews, demonstrating that he was an innocent low level employee without any fraudulent intentions, and that he would establish that on the merits he should not be indicted or named as a co-conspirator. Throughout these discussions, I repeatedly advised Miller that if SCHULZ decided to waive his privilege by submitting to interviews and testifying before the Grand Jury, he did so without any governmental assurances whatsoever as an inducement. I pointed out that we would help refresh SCHULZ's recollection with documents before conducting the interviews and the Grand Jury session itself and that we solicited SCHULZ's assurance that he would later testify in the Grand Jury and not then assert his privilege instead. I expressly warned that SCHULZ's statements during the interview sessions were admissions and that we would not agree to any "off-the-record" sessions where he might speak without prejudice. On January 10, 1976, SCHULZ spent several hours studying numerous documents to prepare for his possible upcoming interviews and/or a Grand Jury appearance.

Additionally, I declined specifically to assure Miller - when asked to do - that SCHULZ was not a "target" and declined further to undertake to advise him if and when he became such. Instead, I explained that the decision to recommend for or against indictment in complex securities cases was not lightly arrived at and typically was a direct function of the growing amalgam of evidence concerning an individual's state of knowledge and that such a decision ought not to be prematurely made and should be deferred until all relevant evidence had been collected and analyzed

APP. 27

10-108 in full. However, I did undertake, at the conclusion of the Grand Jury's investigation, to advise Miller if I had concluded to recommend to the United States Attorney that SCHULZ be indicted. I expressly declined his request that if I form any earlier pro-indictment opinions that I would undertake to so inform him. During this series of conversations, I repeatedly stated that my motivation for declining to undertake any duty to advise SCHULZ or his counsel of any tentative views was because of my fear that if SCHULZ were later indicted, he would attempt to suppress both his Grand Jury testimony and his oral interview statements because of a failure to adequately perform the solicited undertaking.

5. On or about January 20, 1976, Miller advised me that SCHULZ was agreeable to such an oral interview on January 29, 1976, and that he would be coming alone - without Miller or other associate counsel. Miller assured me that SCHULZ understood that his words could and would be used against him during this session and that he had faithfully transmitted my explanations and warnings to SCHULZ himself. I told him that I would send him a letter in this connection which I would appreciate his acknowledging by letter as accurate. A copy of the letter which I then sent is attached hereto as Exhibit B.

7. When, by January 28, 1976, the day before the scheduled meeting, I had not received a response to my letter, I arranged a conference call during which I reviewed with both SCHULZ and Miller the circumstances under which we would be meeting the following day. I then and there advised SCHULZ directly that since his conversations with us would be on-the-record, he had no license to falsify or lie, and that we insisted on these terms just so that his words and answers could be used against him if he

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were later indicted. I repeated my request of Miller that he respond to my letter of January 20, 1976.

8. On January 29, 1971, at the outset of our interview, I advised SCHULZ as to each of the Miranda minamums. I then explained to him that the most direct means by which his words could be used against him was to have the SEC officer then present in the room to report to a trial jury what SCHULZ said on this occasion. I encouraged SCHULZ to be truthful and explained how false exculpatory statements at interview sessions such as this one traditionally formed a part of the Government's state-of-mind evidence, and that if he hoped to avoid indictment he should be extra careful to demonstrate his innocence by holding nothing back and by revealing the bad as well as the good. SCHULZ said that he understood what I had explained. He did not then or ever disclose that he had been previously advised by Miller, apparently on the latter's assumption that no third person would be present to witness this interview, that his oral statements might not be used against him as a practical, rather than theoretical, matter because of the ethical bars to my testifying in the same case in which I was also trial counsel. Also, at no time before our October 21, 1976, telephone conversation on this score, did Miller reveal either that he had so advised SCHULZ or that he, Miller, was then mentally toying with the proposition that his and SCHULZ' conversations with me (and perhaps the Grand Jury as well) might arguably be thought to fall within Rule 408 of the Federal Rule of Evidence.

Contrary to SCHULZ' current suggestion, I repeated the substance of this same advice to him at the beginning of each of our interview sessions on the following two days,

10-108 January 30-31, 1976, as well. (See SCHULZ affidavit, 13). Finally, because of the fact that SCHULZ had materially falsified certain answers on each of the three days, I took pains to advise him at the termination of these interviews of my conclusion that he had not been very forthcoming and that his several denials of seemingly unforgettable facts (e.g. his having participated in discussions and decisions regarding the forgery of signatures on bills of lading and shipping records, and his having personally ordered the destruction of several key pages of the Homex general journal) appeared all too convenient. I urged him to reconsider this approach and to consult further with Miller.

9. On or about February 2, 1976, Miller telephoned me and stated that SCHULZ had transmitted my warnings. I repeated the view that he had deliberately falsified several answers and that such a lack of candor, if it continued, seriously undermined his chances of avoiding indictment. Despite this exchange, Miller stated that SCHULZ desired to return and continue with the interview process under the same terms and conditions. Shortly thereafter I received Miller's letter dated January 28, 1976, a copy of which is attached hereto as Exhibit C.

10. On or about February 6, 1976, and February 20, 1976, SCHULZ returned to my office to continue the interviews. On each occasion, I repeated both the Miranda and additional warnings outlined above. SCHULZ said that he understood the consequences but desired, nevertheless, to answer questions and to testify before the Grand Jury.

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Following these interviews, I again expressed the view to both SCHULZ and Miller that several of SCHULZ's answers had been materially false and misleading and that a repetition of them before the Grand Jury would simply add to SCHULZ's potential exposure. Contrary to SCHULZ' current suggestion, I did not tell him that I had decided to recommend that he be indicted (Schultz Affidavit, ¶4). I thought I had made it clear to both he and Miller, both during this specific series of calls, and before and afterwards, that no decisions would be made until after the actual Grand Jury appearances of all of the various witnesses. I explained that the sworn testimonial record resulting from such inquiries was the surest and most reliable basis for making indictment decisions. I specifically recall Miller asking me if there was any possibility that SCHULZ would not be indicted and I told him that such was possible although perhaps improbable if his deceptions continued. I also recall that Miller and I then had a wide ranging theoretical discussion of the future courses of conduct open to SCHULZ. I explained the fundamentals of negotiating with out office and the respects in which our policies might be different from the Philadelphia practice. I recall explaining how cases are assigned to particular judges by chance and that my speculation about possible sentences - which Miller solicited - if SCHULZ were to plead guilty and "cooperate" with the Government was of no moment whatsoever. At Miller's request, I outlined several examples of historical events involving SCHULZ and observed that, at least tentatively, the probative force of these appeared to be highly incriminatory. The conversation concluded with Miller and I agreeing to meet in

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order to explore the possibilities more carefully. We agreed that SCHULZ's Grand Jury appearance would be postponed until after this meeting.

On several occasions thereafter, SCHULZ called me and supplemented our previous face-to-face interviews. He did so, he explained, with the identical purpose in mind as he had at the outset, i.e. to urge that he not be indicted. I recall that on at least one such call, I arranged for a conference call with Miller so that he would be a participant and so that he would know that Schulz was initiating such direct communications with me.

11. on or about May 11, 1976, Miller and I met to continue our discussion about the possible alternatives open to SCHULZ. I again outlined for him several of the events which showed that SCHULZ had been deliberately falsifying the Homex financial statements. Once again, Miller asked if the door was closed with respect to SCHULZ' indictment and once again he was told that no decisions would be reached for several months because numerous witnesses including, of course, SCHULZ himself had not yet testified. Miller again raised the possibility of recommending probation for SCHULZ if he testified as a Government witness, and I again informed him that we would not agree to recommend such a disposition. It was in this context, that we discussed the areas which Miller might pursue with SCHULZ in order to see if some truthful testimony existed which might form the basis of a more specific and concrete discussion of SCHULZ's chances of avoiding indictment. Because his dealings were apparently limited to certain key insiders and the auditors, Miller agreed to focus his and SCHULZ's attention on the latter, and on any discussions which he might have had on the several aspects of

the Homex financials upon which, by this time, the investigation had narrowed. I categorically deny ever having said, in words on substance, that if SCHULZ' could incriminate Mr. Murray "a partner of Peat, Marwick, Mitchell, I would consider not prosecuting him" (SCHULZ affidavit, 16). I have read a page of Mr. Miller's notes which I am advised relate to this meeting, including the notation, "can Shulcz (sic.) hang Bill Murray on land sales?" and can only suggest that such apparently represents a shorthand notation of Miller's mental processes and certainly not a Governmental suggestion that SCHULZ should consider such an undertaking. I thought I had made it plain to Miller that in this context counsel must be, in the first instance, firmly persuaded of the verity of the proffered testimony before even undertaking serious settlement discussions premised on counsel's representations concerning the substance of the client's testimony. I do recall that Miller indicated that he would probably recommend that SCHULZ consider retaining New York counsel, and I also recall explaining that when SCHULZ appeared as a witness before the Grand Jury, he might then apply to a Magistrate for appointed counsel. I seem to recall that Miller said that if future discussions seemed to be fruitless, he might decide to advise SCHULZ to assert his Fifth Amendment privilege before the Grand Jury. I recall telling him that if he decided to give that advice and if Schulz decided to follow that, that we would schedule a brief Grand Jury appearance at a mutually convenient time.

12. In or about late May or early June, 1976, at either Miller or SCHULZ' request, I agreed to schedule a Grand Jury appearance in connection with SCHULZ's application for appointed counsel. On ^{June} July 11, 1976, David V. Keegan,

Esq. was appointed by the U.S. Magistrate on duty that day to represent SCHULZ. That afternoon, I gave SCHULZ and Keegan access to SCHULZ' prior testimony and other evidentiary materials for the express purpose of facilitating SCHULZ' decision to testify before the Grand Jury as either a cooperating government witness or not, or refusing to so altogether. We agreed to postpone SCHULZ's Grand Jury appearance to afford counsel the time needed to arrive at an informed judgement concerning the advice to be given. On October 21, 1976, Miller told me that he and Keegan had discussed the dangers and benefits to SCHULZ of testifying before the Grand Jury as part of a wide ranging discussion of SCHULZ' options. On or about June 20, 1976, I met with SCHULZ and Keegan to discuss SCHULZ' decision. SCHULZ participated directly in this conversation making assertions of both fact and opinion.

13. At some point during the period June 20, 1976, through July 3, 1976, Miller telephoned me and stated in substance that SCHULZ was considering a guilty plea to a conspiracy count. Initially, he wanted to agree upon the judge in advance, but when I demurred he agreed to the normal assignment by chance of the whole indictment. Next, he wanted agreement upon the scope of that conspiracy charge and the allocution associated therewith and again I demurred. Finally, we agreed to meet on July 3, 1976, to discuss the matter further. SCHULZ was to be present so that, in the event he decided to talk, he could describe his dealings with the auditor witness who was then scheduled to be interviewed on the following Monday. Miller made no request that such statements be without prejudice. On July 3, 1976, Miller and SCHULZ met with me for approximately 4 hours. I inquired about Keegan's absence and was assured that such was SCHULZ's

desire. Generally, we reviewed the same questions in SCHULZ's presence that Miller had raised on the telephone. At some point during this meeting, SCHULZ expressed the thought that he was considering testifying in the Grand Jury, not as a cooperating government witness, in the hope that he might exculpate himself. At another point, I recall permitting Miller to read a boiler plate written agreement which would be employed as the basis for drafting the written agreement which we insisted upon in all cases; a copy is attached hereto as Exhibit D. I did not elaborate on or otherwise interpret any of its provisions except to explain that a post-indictment decision to cooperate could not be reported to the Court as having taken place at an earlier time. I recall Miller asking if his December 3, 1975 letter offering cooperation couldn't be characterized as cooperation from the outset and I responded that such would be untrue. I recall Miller asking if the other defendants could be identified -- post-decision, but still pre-indictment -- before SCHULZ had to make up his mind about testifying and I again demurred. SCHULZ and Miller said they wanted to reflect further on the matter and also to look at the agreement to be signed. In all events, we agreed that SCHULZ would appear before the Grand Jury on July 16, 1976. Thereafter, SCHULZ then spent approximately two hours reviewing documents and describing his recollections of the several events to which they related.

On October 21, 1976, Miller told me that to the best of his recollection, the factual portions of this conversation or any that had preceded it had not been induced by any Governmental representations of any kind, including specifically any "off-the-record" or "without prejudice" suggestions.

At this time, Miller also stated that he had never before expressed the position or claim to me that the written memorializations exchanged during January were in any respects modified or amended as the negotiations had intensified in the months that followed. In any event, during this call, he did admit that he had kept secret his thoughts about possibly characterizing all of the discussions as Rule 408 compromise offers and never advised SCHULZ that his words would not be potentially useable against him. Apparently as far as SCHULZ had been advised by Miller, his factual assertions, his offers to plead guilty, and his solicitations of immunity from further prosecution could all be offered in evidence against him without distinction. Indeed, I advised SCHULZ at every single session broadly that every time he opened his mouth his words were potentially useable against him as evidence in a criminal trial where he was a defendant.

15. On or about July 8, 1976, I mailed the July 8, 1976, letter to Miller. On or about July 12, 1976, Miller and I spoke on the telephone and he agreed with my suggestion that "perjury and false statements" should be added to the definition of the immunity SCHULZ was to receive. I also advised him that I intended to ask SCHULZ about such matters before the Grand Jury. Miller told me that he believed that he would recommend that SCHULZ agree to its terms and that, if he was willing to do so, he would meet with me on July 15, 1976, to review his testimony.

16. On July 15, 1976, at approximately 5:00 p.m., SCHULZ met with me and told me that he was willing to cooperate but he had not seen the written agreement which had not been received back from Philadelphia. I had him read a copy

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so that its terms would be familiar to him. I did not interpret any of its provisions, and, particularity did not claim that a failure on one of the several conditions under which he might lose the immunities granted was the only circumstance under which his future words and statements might be used against him. We did discuss my intention to ask him about his previous false statements (sworn and otherwise) to those investigating Homex. We then read together excerpts from his testimony before the referee in bankruptcy and a transcript of a taped interview in both of which he, in substance, stated that before October 31, 1971, only minimal reassignments of modules between contracts had taken place. We compared these statements (and SCHULZ's earliest ones to us had been of the same tenor) with the vast practice of reassignments which our investigation had uncovered.* We next reviewed in detail a written statement to the Grand Jury which SCHULZ told me that he had prepared without Miller's knowledge. During this meeting, SCHULZ stated to me, in substance, that he would be willing to testify and give certain answers if I wanted him to even though he did not believe that such would be true. I recall lecturing him at this point on his multiple legal obligations to tell the truth and that my earnest personal desire was that he do just that.

* On October 21, 1976, Miller told me that he and SCHULZ had discussed how to answer the question about prior perjury and false statements when it was asked in front of the Grand Jury and that he had advised Schultz not to admit it unless satisfied that such was the case.

10-108

17. On July 16, 1976, SCHULZ appeared before the Grand Jury; a transcript of which is attached hereto as Exhibit E. We met briefly before that appearance and discussed his overnight reflection on the answers to several questions including the one directed to prior false statements and perjury. He told me that the truth was that he had, under oath and otherwise, previously lied about Homex accounting matters. Pages 54 through 56 of Exhibit E contains another of the answers discussed that morning.

On October 21, 1976, Miller told me that he recalls that on July 16, 1976, at about midnight, he was awakened from a sound sleep by a phone call from SCHULZ who reported that several of his answers during his testimony had been incorrect or false including his answer about previous false statements and perjury. Miller ended the call by asking SCHULZ, in substance, to put it in a letter. Miller also seems to recall having instructed SCHULZ to telephone me with respect to only the answer about prior falsehoods. Both Miller and SCHULZ's appointed counsel advised me that Schulz did thereafter write a letter to Miller which document has been marked "G" for identification purposes. It, together with another letter which has been marked "F", written just prior to July 16, 1976, have been withheld on a claim of privilege. I offered to stipulate without avail that production for this motion would not be asserted as a waiver at trial or elsewhere. Both documents are still being withheld. Miller has advised me that document G lists several corrections other than the claim that his sworn testimony that he had previously lied was untrue. Additionally, I recall a tele-

phone call from SCHULZ several days after his July 16, 1976, Grand Jury appearance in which asked for a copy of the transcript so that he could read it for possible errors. He said that he had written Miller about such errors and he asked if Miller had contacted me. I said no. I recall telling SCHULZ that if something was in need of correction that he should immediately specify what because the judgements then in the process of being made had to be based on hard information. He did not specify anything that he recalled that should be corrected but stated that instead he wanted an opportunity to read the transcript upon completion.

W. CULLEN MAC DONALD
Assistant United States Attorney

Sworn to me, this 29th
day of October, 1976.

December 3, 1975

APP. 39

GEORGE J. MILLER
DIRECT DIAL: (215) 972-3456

Collin McDonald, Esquire
United States Attorney
Criminal Division
Second District of New York
One St. Andrews Plaza
New York, NY 10007

Re: Stirling Homex Case

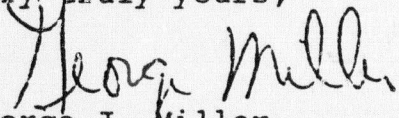
Dear Mr. McDonald:

I represent Edwin J. Schulz who was the Controller of Stirling Homex Corporation and who cooperated fully with the Securities Exchange Commission in its investigation of that corporation. I understand from a newspaper item that you may be reviewing the file with a view toward instituting a criminal prosecution.

I write you this letter to tell you that Mr. Schulz would be willing to cooperate with you in any prosecution which you may institute. If you have any questions as to whether or not Mr. Schulz should himself be prosecuted criminally, I would appreciate your talking to me about that. I am also sure that Ed Herlihy of the Securities Exchange Commission will tell you that Mr. Schulz cooperated fully with the Commission and is not the material for a criminal prosecution.

If someone other than you is in charge of this matter, would you be kind enough to pass this letter on to him with the request that he contact me in the event he desires to take any action with respect to Mr. Schulz.

Very truly yours,


George J. Miller

GJM:dmg

United States Department of Justice

ADDRESS ONLY
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

WCMACD:d1f

75-3888

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

APP. 40

January 20, 1976

Mr. George J. Miller
Dechert, Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102

Re: Stirling Homex

Dear Mr. Miller:

Pursuant to our telephone conversation today, this letter is intended to memorialize the extent of my commitment to you and your client, Edwin J. Schulz.

It is our intention to defer any prosecutorial decisions until the conclusion of the investigatory state. At this point, if we decide to recommend that Mr. Schulz be indicted we will advise you of that fact and afford you an opportunity to persuade us otherwise.

Accordingly, if Mr. Schulz elects to waive both his right to counsel and his privilege against self-incrimination, he does so without any understanding beyond the foregoing limited undertaking.

Very truly yours,

THOMAS J. CAHILL
United States Attorney

By:

W. Cullen Mac Donald

W. CULLEN MACDONALD
Assistant United States Attorney
(212)791-0005

GEORGE J. MILLER
DIRECT DIAL: (215) 972-3456

PRINCES HOUSE
88 GRESHAM STREET
LONDON, ECPY 7NA
GL 606.8888

DECEMBER 1976
2401 CENTRE SQUARE WEST
1800 MARKET STREET
PHILADELPHIA, PA. 19102
TELEX 84 5324 • BARDEF
(215) 972-3400

FEB-2 PM 12:39
S. D. N. Y.

800 NORTH THIRD STREET
HARRISBURG, PA. 17102
(717) 233-7947

January 28, 1976

APP. 41

GEORGE J. MILLER
DIRECT DIAL: (215) 972-3456

W. Cullen MacDonald, Esq.
Assistant United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, NY 10007

Re: Stirling Homex - Edwin J. Schulz

Dear Mr. MacDonald:

I have your letter of January 20th which correctly states the extent to which you have committed yourself in our previous telephone conversations.

I do ask you, as a gentleman, to advise me if at any time during the course of your investigation you become persuaded that it will be necessary to seek an indictment against Mr. Schulz. I understand that you have made no commitment to do that and that your failure to honor my request will not be used by me or Mr. Schulz as a ground for any claim of prosecutorial misconduct.

Very truly yours,

George J. Miller
George J. Miller

GJM:dmg

APP. 42

Memorandum

TO All Criminal Division Assistants

FROM Elkan Abramowitz
Chief, Criminal Division

SUBJECT Guidelines For Written Agreements
With Cooperating Defendants

DATE June 21, 1976

Annexed is the form to be used for all agreements entered into with any individual cooperating with this office. Please read through the form carefully, noting each and every provision contained therein so that each of you will become fully familiar with its terms. At the end of the form letter, there are three provisions which may be included in any agreement if you think the provision may be relevant or desirable in a particular case. If any of these additional provisions are employed, they should be inserted after the last full paragraph on page 2, remembering to finish the agreement with the provisions on pages 3 and 4.

Further, please note that each of these agreements must be approved by me.

To avoid confusion, please bear in mind that this agreement is applicable only in those situations where a witness or a defendant is cooperating with the Government. The policy concerning written agreements does not apply to those situations where a defendant, who is not cooperating, offers to plead guilty to part of an indictment. In those situations, the policy still remains that each of you has the discretion to accept an offer to plead guilty to one-half of the counts



5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

APP. 43

All Criminal Division Assistants
Page Two
June 21, 1976

Re: Guidelines For Written Agreements
With Cooperating Defendants

of an indictment, assuming all the counts of the indictment have an equal scope of punishment. In those situations where there is a disparity in scope of punishment, or where the defendant wants to plead to fewer than half of the counts, approval still must be given by me.

Enclosure

E.A. CA

APP. 44

United States Department of Justice

ADDRESS REPLY TO:
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

GUIDELINES FOR WRITTEN AGREEMENTS
WITH COOPERATING DEFENDANTS

John Doe, Esq.
[Address]

Re: [Name of Cooperating Witness]

Dear Mr. Doe:

[General Provisions To Be Included
In All Agreements]

On the understandings specified below, the United States will accept a guilty plea(s) from [name of Cooperating Witness] to Count(s) _____ of Indictment (Information) 76 Cr. _____ charging [a] violation(s) of _____ USC §(§) _____ carrying a maximum sentence of _____ years and a \$ _____ fine on each count. If he fully complies with these understandings, [Cooperating Witness] will not be prosecuted by this Office for other existing charges known to this Office hereinafter specified, or for potential charges based upon information supplied to this Office by [Cooperating Witness]. Such immunity specifically includes charges related to [description of transaction or transactions which may be the subject of the witness' cooperation noting any express exceptions].



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John Doe, Esq.
Page Two

Re: [Name of Cooperating Witness]

The understandings are that [Cooperating Witness] shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him, and, further, shall truthfully testify before the Grand Jury and/or at any trial or other court proceeding with respect to any matters about which this Office may request his testimony.

It is further understood that the sentence to be imposed upon [Cooperating Witness] is within the sole discretion of the sentencing Judge. This Office cannot and does not make any promise or representation as to what sentence [Cooperating Witness] will receive, nor will it recommend any specific sentence to the sentencing Judge. However, this Office will inform the sentencing Judge and the Probation Department of (1) this agreement; (2) the nature and extent of [Cooperating Witness'] activities with respect to this case; (3) the full nature and extent of [Cooperating Witness'] cooperation with this Office and the date when such cooperation commenced; and (4) all other information in its possession relevant to sentence.

It is further understood that this agreement is limited to the United States Attorney's Office for the Southern District of New York, and cannot bind other federal, state or local prosecuting authorities, although this Office will bring the cooperation of [Cooperating Witness] to the attention of other prosecuting offices, if requested.

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John Doe, Esq.
Page Three

Re: [Name of Cooperating Witness]

It is further understood that [Cooperating Witness] must at all times give complete, truthful and accurate information and testimony and must not commit any further crime whatsoever. Should [Cooperating Witness] commit any further crimes or should it be judged by this Office that [Cooperating Witness] has given false, incomplete or misleading testimony or information, or has otherwise violated any provision of this agreement, this agreement shall be null and void and [Cooperating Witness] shall thereafter be subject to prosecution for any federal criminal violation of which this Office has knowledge, including, but not limited to, perjury and obstruction of justice. Any such prosecutions may be premised upon any information provided by [Cooperating Witness], and such information may be used against him.

No additional promises, agreements and conditions have been entered into other than those set forth in this

John Doe, Esq.
Page Four

APP. 47

Re: [Name of Cooperating Witness]

letter and none will be entered into unless in writing
and signed by all parties.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By: _____

Assistant United States Attorney

APPROVED:

ELKAN ABRAMOWITZ
Chief, Criminal Division

AGREED AND CONSENTED TO:

[Cooperating Witness]

APPROVED:

Attorney for [Cooperating Witness]

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[Specific Provisions To Be Included Only
If Relevant]

(1) It is further understood that because [Cooperating Witness'] truthful cooperation with this Office may reveal activities of individuals who in the view of this Office might use violence, force and intimidation against [Cooperating Witness] and his family for the purpose of retaliation or otherwise, this Office will take all reasonable steps to insure that any period of imprisonment imposed on [Cooperating Witness] will be served in a federal prison institution at which he will be protected from bodily harm. Further, if necessary and appropriate in view of this Office, arrangements may be made whereby [Cooperating Witness], his wife and children can be relocated under a new identity in order that no harm comes to any of them as a result of [Cooperating Witness'] cooperation. It is further understood by [Cooperating Witness] that such protection or relocation is under the direction and control of the United States Marshal and not of this Office. It is further understood that, from time to time, other steps and measures which in the judgment of this Office are necessary for the health, safety and well-being of [Cooperating Witness] and his family, may be taken with or without [Cooperating Witness'] consent.

(2) It is further understood that this Office will bring the cooperation of [Cooperating Witness] to the attention of Federal Parole Authorities at the appropriate time, but such information will be transmitted without any recommendation as to what action the parole authorities should take.

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(3) It is further understood that [Cooperating Witness] shall, upon the acceptance by the Court of his plea of guilty, execute a resignation from the Bar of the State of New York, and a consent to the entry of an order striking his name from the roll of attorneys and counselors-at-law in the State of New York in a form acceptable to the Committee on Grievances of the Association of the Bar of the City of New York. In addition, [Cooperating Witness] will not apply for readmission to the Bar of the State of New York unless and until he has been granted a full and complete pardon for the crime(s) to which he has pleaded guilty, and in no event will he apply for readmission before the expiration of five (5) years from the time of the entry of the guilty plea.

1 E D W I N J . S C H U L Z , called as a witness,

2 having been duly sworn by the Foreman of the Grand Jury,
3 testified as follows:
4

5 BY MR. MacDONALD:

6 Q Would you state and spell your full name, please,
7 and give us your home and business addresses and telephone
8 numbers.

9 A Full name is Edwin J. Schulz, S-c-h-u-l-z; 1960 Pine
10 Drive, Lancaster, Pennsylvania. My business address is
11 1322 Loop Road, Lancaster, Pennsylvania.

12 Q Try and speak to the last lady in the last row, I'll
13 keep my voice up, and we will all be able to hear.

14 Mr. Schulz, as a witness before this Grand Jury, you
15 appreciate, do you not, that you have a right to refuse to
16 answer any question, the answer to which might tend to in-
17 criminate you?

18 A Yes.

19 Q And you understand further that waiving that right
20 and giving answers in the ordinary case, subjects the person
21 giving the answers to the possibility that they can be used
22 against him in a later criminal proceeding?

23 A Yes.

24 Q You understand that under certain events, which I
25 will describe in a moment, your answers today can be used

1
2 against you in some later criminal proceeding as well?

3 A Yes.

4 Q So, when you make answers today and waive your right
5 of silence, you appreciate the possibility that some day
6 those answers can be used against you?

7 A Yes.

8 Q In addition, you understand you have a right to con-
9 sult with counsel before answering any question if you feel
10 the need to do so, and the Foreman will permit you to go out
11 and go to the telephone and call Mr. Miller, if you desire.

12 A Yes.

13 Q You also understand, do you not, that the oath which
14 you just took, requires you to give truthful testimony, and
15 a knowingly false response would subject you to possible
16 prosecution for perjury?

17 A Yes.

18 Q You are appearing here today, are you not, under
19 certain assurances which are embodied in a document numbered
20 88296 to 298?

21 A Yes.

22 Q The ribbon original of this letter to your lawyer,
23 as you understand it, is en route back from Philadelphia in
24 the mails now, but yesterday you read this carbon copy in my
25 office and you're clear that this embodies the extent and

scope of the understandings that have induced you to appear here and to waive your privilege of silence?

A Yes.

Q You commit, do you not, in this letter and to this Grand Jury that you will plead guilty to that count of its indictment which charges you with the violation of federal law, which is the general Federal Conspiracy Statute, which carries a maximum term of imprisonment of five years and a maximum fine of \$10,000?

A Yes.

Q You understand that beyond that charge, you have received assurance of immunity from prosecution as set forth in this letter and now summarized by me as relating to mail frauds, wire frauds, security frauds, and prior perjury and false statements?

A Yes.

Q You commit further that you will truthfully disclose to the U. S. Attorney's office, to this Grand Jury, and to any other investigators working on this matter, everything which you know in respect of the Stirling Homex Corporation and the people connected with it?

A Yes.

Q You understand that should you at any time in the course of your cooperation, give less than the whole truth

1
2 by either an omission or deliberate false statement, that all
3 of the immunity which you have been assured, falls away
4 and you're subject to full prosecution for all of the of-
5 fenses which I just referred to?

6 A Yes.

7 Q You also understand, do you not, that the judge to
8 whom the indictment in this case is assigned, will have the
9 responsibility of imposing a sentence upon you within the
10 range I have already referred to, will have unfettered dis-
11 cretion in that regard?

12 A Yes.

13 Q You understand as set forth in this agreement and
14 now summarized by me, the United States Attorney's office
15 will simply report to that judge the nature and extent of
16 your cooperation without any recommendation in respect of
17 an appropriate sentence?

18 A Yes.

19 Q It is the fact, is it not, that you hope and enter-
20 tain the hope and expectation that at the time the judge im-
21 poses sentence on you, that he will sentence you to some-
22 thing less than what he would otherwise impose, if you hadn't
23 agreed to cooperate and to aid the U. S. Attorney's office
24 and this Grand Jury in its inquiries?

25 A Yes.

1
2 Q In addition, it is the fact, is it not, that during
3 the -- withdrawn.

4 It is the fact, is it not, that you have previously
5 given false statements to officials connected with the bank-
6 ruptcy of Stirling Homex, to SEC officials, to the United
7 States Attorney's office, and investigators associated with
8 it, and to private civil lawyers with whom you have spoken
9 in regard to the affairs of the Stirling Homex Corporation?

10 A Yes.

11 Q And those were motivated, at least in part, by a
12 desire to minimize your role in the extent of your involve-
13 ment in the Stirling Homex affairs?

14 A Yes.

15 Q You made such statements whether you happened to
16 be under oath or not at the time, and those that were under
17 oath were necessarily perjurious?

18 A Yes.

19 Q Last night we examined several pages of the prior
20 statements that you gave to the referee in bankruptcy in
21 the United States District Court in Buffalo, and several
22 pages of a transcript of an unsworn statement that you gave
23 to private civil lawyers here in New York, and found examples
24 where on both occasions you had falsely answered questions.
25 with respect to the subject under inquiry?

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A Yes.

Q It is also the fact that you have not read those statements in toto for several years?

A Yes.

Q Yesterday when you walked into my office, you handed me a document bearing numbers 88290, 295?

A Yes.

Q This is titled A Submission to the Grand Jury, and you prepared it on July 14 of this week, 1976, without the knowledge of either your lawyer or any representative of the government, and without having previously discussed it with anyone?

A Yes.

Q It deals with the matters specified therein which relate to the Stirling Homex Corporation and to the investigation, and with subjects that you have not as of the writing of this, or as of today, had the benefit of a thorough review of the evidence and the documents and the previous testimony that also bears on these subjects?

A Yes.

Q *Six months ago in my offices, you had occasion to review your correspondence files with me with a view to refreshing your recollection about the subject matters that were disclosed there, but many of the subjects of this sub-

1 mission to the Grand Jury were not dealt with in the letters
2 that you were writing and retaining?

3 A That is right.

4 Q You're a graduate of Franklin Marshall College with
5 a Bachelor's degree in accounting?

6 A Yes.

7 Q Following graduation and a short stint with the IRS
8 as a trainee, you served in the United States Air Force for
9 three years?

10 A Yes.

11 Q From the time you left the Air Force, until 1968,
12 you worked for two different corporations in the internal
13 audit and accounting departments of those companies?

14 A Yes.

15 Q The highest position you obtained was that of manager
16 of general accounting, which is one or another levels beneath
17 the controllership position in those companies?

18 A Yes.

19 Q In September of 1968 you, in response to a Wall Street
20 Journal advertisement, were interviewed by David Stirling and
21 William Stirling in Avon, New York with respect to your be-
22 coming the controller of Stirling Homex?

23 A Yes.

24 Q At that time you were hired together with a Mr.
25

1
2 Rick Hurrтт, a person whom you had known back in Lancaster,
3 and perhaps you had even worked with at your prior employer?

4 A Yes.

5 Q He was the assistant controller and you were the con-
6 troller?

7 A Yes.

8 Q What was your initial salary?

9 A I believe about \$16,000 a year.

10 Q Had you also orally been told that at the upcoming
11 public offering, you would be permitted to purchase a certain
12 holding of stock in the Stirling Homex Corporation?

13 A Not at that time. I was told that I would receive
14 either gift stock or stock options immediately. There was
15 no mention of a public offering purchase at that point.

16 Q Directing your attention to early 1969, there came
17 a time in that period, did there not, when David Stirling
18 came to you and discussed with you the advisability of
19 Stirling Homex's undertaking as one of its accounting policies
20 the deferral of expenses in certain areas?

21 A Yes.

22 Q For the Grand Juror's benefit, a deferred expense
23 policy has the effect of increasing profits because monies
24 spent are not subtracted from revenues, but instead are re-
25 ported on the balance sheet to the reader as an asset-"de-

1
2 ferred expenses"?

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3 A Yes.

4 Q A sophisticated investor is able to subtract that
5 asset from the revenues reported and reduce profits to a
6 more conservative amount, is he not?

7 A Yes.

8 Q If the company has been in business for several years,
9 the sophisticated investor must be careful to subtract only
10 the additional amount in the deferred expense asset column over
11 the previous year from that current year's earnings to arrive
12 at a more conservative profit report?

13 A Yes.

14 Q When you first joined the corporation, the Harris,
15 Kerr, Forster accounting firm was the retained engaged auditor?

16 A Yes.

17 Q Mr. Joe Perl and Mr. Sy Hammerman were two partners
18 of that firm with whom you dealt?

19 A Yes.

20 Q There came a time in the late spring of 1969, did there
21 not, when in order to reach \$10 million in revenues, a second
22 shift was started on the manufacturing line so that module pro-
23 duction would increase accordingly?

24 A The second shift was started. I can't exactly testify
25 that the reason was to reach the \$10 million in sales. I'm

1
2 sure that was a factor, but I'm not sure that is the only
3 factor.

4 Q In or about June, 1969, or July, do you retain a
5 recollection today of having with Mr. Hurtt one evening dis-
6 cussed the capitalization of certain expenses relating to
7 an invoice which had come in from the Empire Pipe Line Com-
8 pany?

9 A Yes.

10 Q Do you retain a recollection today of having Mrs.
11 Sandroock, your secretary, prepare a second invoice on the
12 letterhead -- a second and third invoice to replace the
13 first one on the letterhead of the Empire Pipe Line Company
14 so that a certain amount of money would be capitalized and
15 not subtracted from revenues?

16 A Yes.

17 Q That was approximately a \$25,000 sum to the best of
18 your current recollection?

19 A Yes.

20 Q Now, the first fiscal year ended July 30, 1969?

21 A Yes.

22 Q At that time, the company's reported earnings were
23 approximately \$1 million on sales of approximately \$10 million?

24 A Yes.

25 Q Underwriters -- withdrawn.

At about that time it became known that the company would be engaging the Pressprich Underwriting firm as its underwriter to sell common stock to the public?

A Yes.

Q In the early fall of 1969, you worked together with Mr. Yanowitch and Mr. Stirling and others on the original drafts of the prospectus describing the business affairs of Stirling Homex which would be given to prospective investors?

A Yes.

Q Ultimately that was filed with the SEC in or about late September or early October of 1969?

A Yes.

Q It's the fact, is it not, that it was in or about that same general time frame that Mr. David Stirling discussed your receipt of options to buy 10,000 shares of Stirling Homex stock at an exercise price of \$3 per share?

A Yes.

Q There came a time in the winter of 1969, early 1970, when the registration statement then on file with the SEC was in need of amendment to include five months' earnings through December 31, 1969, right?

A Yes.

Q And those were unaudited earnings, but Harris, Kerr, Forster was going to look over your shoulder and review them,

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1
2 although not audit them?

3 A Yes.

4 Q There came a point in that same time frame, did
5 there not, when one evening you had a conversation with
6 several employees of Stirling Homex with respect to certain
7 documents which those auditors expected to receive the fol-
8 lowing morning?

9 A Yes.

10 Q Would you tell the ladies and gentlemen of the Grand
11 Jury what you recall of the conversation that you had with Mr.
12 McKeon, M-c K-e-o-n; and whoever else was present on the
13 occasion of that evening?

14 A Richard Hurtt and McKeon and myself were reviewing
15 the paper work that was to be presented to the auditors
16 the following day. I discovered that documents which should
17 have been prepared and signed by the common carrier had
18 not been signed, and had not been done through an oversight
19 on Dick McKeon's part, at which time I became very angry and
20 made a statement "Well, I'm not going to sign them, you're
21 going to have to" in anger.

22 Dick McKeon proceeded to begin sign them. He
23 signed the first one. I told him at that point to stop sign-
24 ing them. I said, "No, don't do that, that is not right."

25 At about that time, David Stirling came into the

1 office and asked me what the fuss was about because I was
2 very loud. He called me out of the office and I explained
3 the situation to him. At that point, he said, "Well, I'll
4 take care of those, that really is Frank Csapo's job, go
5 get them."

6
7 I did, I went back and got them from Dick McKeon and
8 gave them to David Stirling.

9 I did not see the return of the documents, but a
10 short time later, a day or two days, Frank Csapo did step
11 into my office and say that David Stirling had gotten him
12 up out of bed to get the documents signed, and mentioned
13 that he apparently had to go some distance to obtain a sig-
14 nature.

15 Q In that first year, and in also the five months'
16 earnings statement that was the subject of that request by
17 the auditors for those signed documents, the company had re-
18 ported sales when -- withdrawn.

19 In the registration statement that was ultimately
20 employed to sell the common stock in February of 1970, the
21 company had described its accounting practice as recognizing
22 sales when modules were manufactured and delivered to inde-
23 pendent carriers who used facilities on the company's premises?

24 A Yes.

25 Q And it was as a result of that event, that is the

1
2 delivery to the carrier, that the auditors requested these
3 documents which served as proof of delivery to a carrier?

4 A Yes.

5 Q It is the fact, is it not, that the modules themselves
6 physically were located in that winter around the company's
7 plant in Avon, New York?

8 A Yes.

9 Q The previous July 31, 1969 when the auditors had done
10 their year end audit for the first year the modules had all
11 been shipped, or in the main had been shipped, were not
12 physically stored around the company's premises?

13 A Yes.

14 Q It is the fact, is it not, that at July 31, 1970
15 when the auditors were coming in to do the second year, there
16 were numerous modules stored in and around the company's
17 premises in Avon, New York, and at other distant storage
18 locations?

19 A Yes.

20 Q David Stirling had expressed to you on numerous oc-
21 casions in '68, '69 and later years, his profit projection
22 model of doubling sales and doubling profits from year to
23 year?

24 A Yes.

25 Q He also expressed to you his hope that the company

1
2 would report ten percent profit after taxes on those sales,
3 at least ten percent profit after taxes on those sales?

4 A Yes.

5 Q And there came a time, did there not, when in the
6 late spring and early summer of 1970 you had a conversation
7 with David Christman about a short fall of a half million
8 dollars with respect to that projected profit?

9 A Yes.

10 Q Mr. Christman was an assistant controller, or a
11 manager of accounting for the installation division of Stirling
12 Homex?

13 A Yes.

14 Q And that division kept its own set of books, although
15 they may have used the same computer that Stirling Homex used?

16 A Yes.

17 Q And one of Mr. Christman's jobs was to calculate on
18 a percentage completion basis the revenues to be reported (and)
19 the costs of goods sold, or cost of installation to be reported
20 for that division?

21 A Yes.

22 Q It is the fact, is it not, that he had performed
23 those calculations in the winter of 1969, '70 for use at that
24 time in providing firm figures to you for inclusion in the
25 company's financial statements in that period?

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A Yes.

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Q And he reported to you in the summer of 1970 that he had neglected to keep current on the necessary calculations in his division, that he had only recently done them?

6

A Yes.

7

8

9

10

Q And he was bringing you the news that the results of his having recently done them were a half million dollars less than he and you had otherwise hoped they would be, the bottom line result of profitability?

11

A Yes.

12

13

Q You told him in substance, if not words, that it would not be possible -- withdrawn.

14

15

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18

You told him in substance, if not words, to delay recordation of the accounting entry embodying that calculation that he performed until after the close of the fiscal year, i.e., in August, and then perform the calculation and make the appropriate accounting entry?

19

A Yes.

20

21

22

Q There came a time thereafter in late August or early September when you and David Stirling had a discussion which related generally to this same subject matter?

23

A Yes.

24

25

Q And in substance, if not words, Mr. Stirling expressed to you the thought that he didn't want to have to deal with

1
2 the problem of the installation division expenses at that
3 time, that is late August, early September, 1970?

4 A Yes.

5 Q And it is the fact that you did not disclose to him
6 at that time the extent of the problem, or its nature, or
7 the details of the accounting entry which Mr. Christman had
8 postponed making?

9 A I don't believe I did.

10 May I add something?

11 Q Yes.

12 A David Stirling did express that he believed that the
13 half million dollars additional costs could be collected
14 from the customers.

15 Q In or about the same general time frame, that is
16 July, August, 1970, you had occasion to have a discussion, or
17 a series of discussions with Mr. Stirling about capitalizing
18 a significant sum of money, in the range of perhaps a quarter
19 to a half million dollars, to a plant to be located and
20 built near Corinth, Mississippi?

21 A Yes.

22 Q At that time you had occasion to prepare a billing
23 and an explanation of that billing in that regard?

24 A Yes.

25 Q That billing in substance said that various employees,

1 including the top officers of Stirling Homex and their
2 secretaries, and their related and associated overhead ex-
3 penses, in part were properly capitalized against that pro-
4 ject, the building of a plant in Corinth, Mississippi?
5

6 A Yes.

7 Q Now, the capitalization of expenses is as an ab-
8 straction similar to the deferral of expenses as it effects
9 the profits that a company reports?

10 A Yes.

11 Q If a company has a hundred dollars in sales revenues
12 and \$50 are spent by it to produce the goods that give rise
13 to the hundred dollars, if nothing else happens, the company
14 would subtract 50 from 100 and report \$50 in profits?

15 A Yes.

16 Q However, if some of those \$50 are claimed to have
17 been spent on capital improvements useable over the life
18 of the capital improvement itself, they are not subtracted
19 from revenues, but instead just like deferred expenses, are
20 put on the balance sheet as capital goods and they are not
21 subtracted from revenues in calculating profits?

22 A Yes.

23 Q In other words, if the company decided to capitalize
24 \$25 of the 50 it spent and carried on the balance sheet, it
25 would then report profits of \$75 instead of \$50?

APP. 68

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A Yes.

Q Stirling Homex never built a plant in Corinth, Mississippi, did it?

A No.

Q There came a time, did there not, in the winter of 1971 when you had an additional conversation with David Stirling about the capitalization of expenses in connection with a plant now to be located in Southern, Mississippi?

A Yes.

Q In substance, David Stirling told you, if not in words, that the amount, or the sum to be capitalized could arbitrarily be determined, and asked you to give him such a sum, and on the spot you said \$832,000 is the sum I'm giving you?

A He gave me a range, he said 8 to \$900,000 is what he had negotiated and would I give him a figure. I arbitrarily gave him a figure of \$832,000.

Q In that same conversation, you and Mr. Stirling discussed whether or not there would be a need to supply the auditors with any backup materials with respect to that sum?

A Yes, I asked him if it would be necessary to support that billing with a detailed record of expenditures, and he replied he thought so.

Q That detailed record of expenditures that you had

1
2 in mind or referred to the previous summer had been a two
3 page listing of officers' and employees' salaries, together
4 with associated overhead expenses?

5 A Yes.

6 Q And you gave an instruction to an accounting sub-
7 ordinate in the winter of '70, '71, to prepare a similar
8 such record?

9 A Yes.

10 Q For possibly giving to the auditors if they requested
11 it?

12 A Yes.

13 Q Did there come a time when you actually purchased some
14 stock and received it through Pressprich & Company, or other-
15 wise, in the Stirling Homex Corporation?

16 A Yes, I believe I purchased 400 shares at the time of
17 the initial public offering.

18 Q Did there come a time when you ever received any
19 additional shares by some other fashion?

20 A I received gift stock prior to that time of 3,000
21 shares.

22 Q Did there come a time when you sold stock in your
23 company for the first time?

24 A Yes, I initially sold a hundred shares of the stock
25 I had purchased from Pressprich about six months later. Then

1
2 I sold the 3,000 shares in the fall of 1971, and in the
3 spring of 1972, I sold the remaining 200 shares.

4 Q And the first sale of 100 shares was at approximately
5 what price?

6 A I believe about \$19, but I'm not sure.

7 Q The last sale -- withdrawn.

8 Your cost had been \$16.50?

9 A Yes.

10 Q The 3,000 shares which you sold in the fall of 1971
11 and the early spring of 1972, perhaps, resulted in how much
12 revenues on their sale, approximately?

13 A I believe it was approximately \$50,000.

14 Q And the 300 shares which you sold thereafter resulted
15 in approximately -- you sold at what price?

16 A \$17.

17 Q The 3,000 shares you had -- withdrawn.

18 Directing your attention to September, 1970, during
19 that month and perhaps before and after it, you participated
20 in a series of meetings and conversations with Harris, Kerr,
21 Forster in respect of their decision to certify to the com-
22 pany's earnings for the second fiscal year ending July 31,
23 1970?

24 A Yes.

25 Q In part, those conversations included whether or not

1
2 the fact that the company was no longer using the contract
3 which included delivery to carrier as an important contractual
4 event on which right in the modules were said to be trans-
5 ferred from the seller to the buyer was discussed at length?

6 A Yes.

7 Q And the contract which was then being employed in
8 the second fiscal year in the main did not have such a pro-
9 vision, and instead promised that a customer would become the
10 owner of the dwelling when he received the keys and delivered
11 a check after the thing had been completed and ready to be
12 walked into?

13 A Yes, regarding the contract. However, that was not
14 in the main. I think the totals for the year, the Turnkey
15 contract represented less than 20 percent of total sales.

16 Q For fiscal 1970?

17 A Yes.

18 Q At that time Joseph Mauriello was hired by the com-
19 pany to prepare memoranda in respect of the appropriateness
20 of the accounting treatment which the company proposed to
21 follow in regard to those module sales?

22 A Yes.

23 Q It is the fact, is it not, that in the course of
24 those discussions you did not reveal to the Harris, Kerr,
25 Forster auditors the instruction that you had given to Mr.

1
2 Christman about the accounting entry being delayed into
3 August relating to those computations which he had performed?

4 A Yes.

5 Q And you agree that the auditors should have known
6 that so they could have fairly appraised the appropriateness
7 of the accounting method which was then being discussed?

8 A Yes.

9 MR. MacDONALD: Mr. Foreman, if we could stand
10 adjourned for five minutes.

11 Mr. Schulz, will you wait outside?

12 THE FOREMAN: We will recess for five minutes,
13 Mr. Schulz, will you wait outside.

14 (Recess had.)

15 Q Mr. Schulz, it is your best recollect currently;
16 is it not, in your tax return in which you included the
17 \$50,000 realized on the sale of the 3,000 shares you reported
18 the basis for the stock at zero?

19 A Yes.

20 Q You haven't looked at that return, I take it, in
21 several months, perhaps years?

22 A Years.

23 Q With respect to your sale in the fall of 1971 of
24 those shares, it is the fact, is it not, that previous
25 thereto you had made a trip to the Virgin Islands personally

1
2 to talk with a man named Charles Grimm concerning a contract
3 which a company which Grimm controlled had entered into
4 with the Stirling Homex Corporation?

5 A Yes.

6 Q That was sometimes referred to as the Virgin Islands
7 project, and it was a significant amount of money?

8 A Yes.

9 Q It is the fact, is it not, on your arrival at the
10 Virgin Islands you went to a motel, and on the second floor
11 of the motel there Grimm had two rooms which served as his
12 offices?

13 A Yes.

14 Q You don't recall the name or the names that appeared
15 to the doors of those two rooms today, do you?

16 A No.

17 Q It is the fact, is it not, that on the occasion of
18 that trip, you discussed with Mr. Grimm and an associate of
19 his, the status of that contract and their willingness to
20 perform and to actually purchase the modules?

21 A Yes.

22 Q In substance, you recall them telling you that unless
23 they receive a price reduction of a significant size, they
24 had no intention of performing?

25 A Yes.

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Q You thereafter received -- withdrawn.

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You thereafter returned to Avon, New York, and discussed the trip that you made with David Stirling and others in the organization?

6

A Yes.

7

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Q It is the fact, is it not, that you had seen a telegram at Stirling Homex purporting to have been from Mr. Grimm and that company which cancelled the Virgin Islands contract?

10

A Yes.

11

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14

Q You directed at a later time when it was decided what computer entry would be made for sales for the first quarter of 1971 that the Virgin Islands sales would be reversed out at that point?

15

A Yes.

16

17

18

Q And that write-off of sales, and the decision to write off sales was the subject of some conversation between yourself and David Stirling and perhaps others?

19

A Yes.

20

21

Q I will read into the record at this point paragraph G in document 88295.

22

23

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Before I do that, you knew that the public until early December, 1971, would have no access to the information in respect of the decision to write off the Virgin Islands sale?

A Yes.

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Q And no press release was issued so that Wall Street could discount, if it decided it wanted to, the price that the people were paying for the Stirling Homex stock?

A Yes.

Q There came a time in late November, early December, 1971, when Peat, Marwick, Mitchell as the company's auditors was told that the Virgin Islands contract had been written off on the accounting books of the company?

A Yes.

Q Now, I'll read the paragraph in the document which you prepared on Tuesday of this week.

"Reversal of Virgin Island contract: This information was disclosed to Mike Horn and Tom Woods in November or December, 1971. I'm positive I told them that Homex had sent an engineer to the Virgin Islands, and that his report indicated a substantial delay in constructing the project, that we could use the units in another project. We expected to go quickly, that the Virgin Island buyer was giving us a hard time in demanding a price reduction. I did not inform them of a telegram I had received cancelling the contract."

Now, those three or four sentences encapsulate, do they not, a series of conversations and telephone calls you had in the November, December time frame concerning this matter with Mr. Horn and Mr. Woods?

APP. 76

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A I don't understand the question.

Q Those three or four sentences are intended to summarize or encapsulate extended discussions that may have lasted upwards of several hours on this subject?

A Not with members of Peat, Marwick, Mitchell, that I recall.

Q Well, it is your testimony, is it not, Mr. Schulz, that you and Mr. Horn discussed whether or not the reassignment of modules between contracts was or was not part of the Stirling Homex accounting policy in regard to the recognition of income on the sale of modules?

A Yes, that was discussed.

Q Let me stop you there and say that the subject of reassignment of modules as being within or without the Stirling Homex accounting policy is nowhere set forth in this paragraph which I read, right?

A Yes.

Q So, in that sense at least, that is at least one matter that was a subject of discussions which are not here summarized?

A No, they are not.

Q There may be other matters that you currently recall which ought to be set forth here so it is a complete summary, right?

APP. 77

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A Yes.

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Q I would like to direct your attention to Sunday,
February 21, 1971.

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A Yes.

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Q On that day, did you have occasion to fly with your
wife and children in the Stirling Homex airplane from Avon,
New York, or Rochester, to New Jersey, and to attend a meeting
with Mr. Murray and Mr. Mauriello at the latter's home?

10

A Yes.

11

12

Q You and Mr. Mauriello sat in the gazebo, or the pool-
side room for a portion of that conversation?

13

A Yes.

14

15

Q And Mr. Mauriello was in and out during the course
of your talk?

16

A Yes, but I believe he was there most of the time.

17

18

19

20

Q The previous day you had had a conversation with
David Stirling in which he directed you to cancel your plans
to remain with your family in northern New York on that day
and to change them and attend this meeting?

21

A Yes.

22

23

24

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Q Mr. Stirling, in substance, if not words, told you
that you should review with Mr. Murray the company's more
important accounting policies, and to take with you certain
documents which would be of utility in that review?

APP. 78

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A Yes.

Q Do you remember at least having collected together a copy of the prospectus of February, 1970, and perhaps additional year end statements for possible reference in your discussions?

A Yes.

Q Now, you had also prepared earlier that week on Thursday and Friday, a three page written summarization of those major accounting policies which was titled "Accounting Policies"?

A Yes.

Q And that had been prepared for delivery to Mr. Mauriello at an earlier time for his use, so you had been told, in reviewing those same matters with Mr. Murray?

A I understand that from your office.

Q You were not explicitly so informed that the document was put to that use at the time you were requested to prepare it?

A That is right.

Q In your conversation with David Stirling on that Saturday afternoon, do you have a recollection of his having mentioned Mauriello in any fashion on that day, say, for the appointed meeting the following day?

A Yes, he told me, or implied, that Professor Mauriello

1
2 had reviewed accounting matters with Peat, Marwick, Mitchell,
3 and that my trip was to make certain that they understood
4 and to answer any questions that the Professor may not have
5 been able to answer.

6 Q He told you directly to see what kind of man you
7 would be dealing with, and to report back whether he was of a
8 positive attitude or not?

9 A Yes.

10 Q On the following day in the course of your discussion
11 with Mr. Murray, you described to him, did you not, accounting
12 policies which were set forth in that three page description
13 which you had prepared the previous Thursday and Friday?

14 A Yes.

15 Q That included the method the company followed in re-
16 cording its income on the sale of modules?

17 A Yes.

18 Q It also included the method the company proposed to
19 follow in recording income on certain other activities in-
20 cluding installation sales, U.S. shelters earning commitment
21 fees, and perhaps others?

22 A Yes.

23 Q You also explained to Mr. Murray the company's de-
24 ferred and capitalized expense policies as set forth in
25 that document, and an attachment thereto which described each

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of the sub-accounts and the policies employed in those regards?

A Yes.

Q It is also the fact, is it not, that you described to Mr. Murray the \$832,000 reimbursement item which you and Mr. Stirling had discussed earlier that year?

A Yes.

Q It is also the fact that you briefly referred to the company's accounting policy of capitalizing on its balance sheet, land which it held for sale, and in that context adverted to the land transaction which you new Mr. Murray to have been previously discussing with Mr. Mauriello that would be reported in the current period?

A Yes.

Q And your best recollection is that in substance you said to Mr. Murray when you came to that land sale transaction, that you understood that he and Mr. Mauriello had been discussing it in considerable detail, and you referred him to Mr. Mauriello, and then the conversation then turned to other matters?

A Yes.

Q Now, if I can refer you backwards in time for a moment, to September of 1970, the time that you had those extensive discussions with Harris, Kerr, Forster with respect

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2 to their certifying your second year's earnings. That ac-
3 counting firm had ultimately advised the company that it would
4 be agreeable to the recognition of income on sales under
5 the Turnkey contracts and the other contracts, but that ad-
6 ditional audit evidence which they desired would include
7 building permits and proof of control of land in respect of
8 the various projects that were going to be in sales?

9 A Yes.

10 Q And you had written some memoranda to David Stirling
11 in the January, early February time frame, in which you ex-
12 pressed some concern that though you had been able to supply
13 Harris, Kerr, Forster in the past with the evidence necessary
14 to satisfy their requests, that in a future a bulky govern-
15 ment official might make it difficult to supply them with
16 building permits if that condition persisted?

17 A Yes.

18 Q There came a time on that Sunday, the 21st, when
19 you discussed with Mr. Murray the respective Stirling Homex,
20 Harris, Kerr, Forster positions concerning those building
21 permits and the proof of control of land?

22 A Yes.

23 Q The summarization that I have just recounted does not
24 include the details of each of those general subjects that
25 arose in the course of your describing them to Mr. Murray

1
2 and his asking any clarification questions necessary to his
3 listening with care to what you were saying?

4 A Yes.

5 Q At the end of that meeting in substance, if not words,
6 you asked Mr. Murray, didn't you, if he saw any problem with
7 these policies or areas?

8 A Yes.

9 Q And do you recall him answering in substance, if not
10 words, that he did not, but that he would have to check with
11 his department of professional practices as he normally did
12 in such matters?

13 A Yes.

14 Q It is also the fact, is it not, that in the course
15 of that concluding portion of the meeting he asked you if
16 the Stirling brothers were honest persons?

17 A Yes.

18 Q There came a time thereafter on the following day,
19 when you reported back to David Stirling in the hallway with
20 respect to the meeting that you had had with Mr. Murray in
21 Mauriello's home?

22 A Yes.

23 Q On that occasion, Mr. Stirling and you discussed each
24 of the items, item by item, the accounting policies that
25 the company was following and which were embodied in that

1
2 memo, and you reported to Mr. Stirling your satisfaction
3 with Murray's response, and -- withdrawn.

4 Mr. Foreman, may I ask the Grand Jury to stand in
5 recess for a couple of minutes, I have to talk to a
6 judge.

7 THE FOREMAN: Ladies and gentlemen, we are in
8 recess for ten minutes.

9 (Recess had.)

10 THE FOREMAN: You understand you're still under
11 oath, Mr. Schulz?

12 THE WITNESS: Yes.

13 Q In the main on that following Monday, February 22,
14 1971, you reported to David Stirling your satisfaction with
15 the conversation which you had had the previous day with Mr.
16 Murray?

17 A Yes.

18 Q And you have a recollection that Mr. Stirling in the
19 hallway in the executive suite doublechecked by asking you
20 about each of the important accounting policies, that is the
21 company's policy of recognizing income on the sale of modules
22 and the others that were encapsulated on that writing which
23 you prepared the previous week?

24 A Yes.

25 Q Directing your attention to on or about March 29,

1 1971, it is the fact, is it not, that in that time frame
2 you were told by Mr. Murray in a telephone conversation
3 that it would be more appropriate to report the \$832,000
4 sum in the property plant equipment sub-account -- withdrawn.
5

6 In the property, plant, equipment general heading
7 in the sub-account dealing with construction in progress
8 than accounts receivable where it had theretofore been
9 thought reportable?

10 A Yes.

11 Q It is the fact, is it not, that you had a conver-
12 sation independently of the one we just referred to with
13 Michael Horn during which conversation he expressed to you
14 his belief in substance, if not words, that the support
15 for that \$832,000 sum was weak?

16 A Yes.

17 Q Do you recall that your response in substance, if
18 not words, was that it was the best available under the cir-
19 cumstances, and if it was insufficient, it would be appro-
20 priate to write it off or not as Mr. Horn felt proper?

21 A Yes.

22 Q On July 14, 1976, in this same regard, you wrote on
23 document 88291 "I was told by Mike Horn of PMM that the
24 documentation of expense supporting this billing was weak
25 and could be a problem, at which I deferred to charge off

1
2 to expense any and all of the billing amount. He declined.'

3 A The word is offered.

4 Q I'm sorry.

5 MR. MacDONALD: If the reporter would note the
6 correction that the word deferred, should be replaced
7 by the word offered.

8 Q When you wrote that, you were again summarizing
9 the historical event which you participated in?

10 A Yes.

11 Q Directing your attention to on or about March 19,
12 1971, on that day you attended a series of discussions with
13 Mr. Lowengrub, Mr. Murray and Mr. Horn of Peat, Marwick,
14 Mitchell at your premises at Stirling Homex?

15 A Yes.

16 Q And at some point in that series of discussions, the
17 subject of the Clay land sale arose?

18 A Yes.

19 Q It is the fact, is it not, that in substance, if not
20 words, Mr. Murray inquired of you as to who were the persons
21 who were behind the buyer, and if you knew any of them, and
22 you responded that you knew Bill Grago who was, and whose
23 company was a prime subcontractor of the Stirling Homex
24 Corporation?

25 A Yes.

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2 Q You also responded in words, if not substance, that
3 you had no idea as to the exact amount of the annual payments
4 to that corporation, or whether it was a captive company, or
5 all of its earnings stemmed from Stirling Homex's activities,
6 right?

7 A I expressed the opinion that I did not believe that
8 they were a captive company, but I did not know what the
9 percentage of their business came from Stirling Homex.

10 Q It is your recollection that in addition you also
11 expressed the thought in substance, if not words, to Mr.
12 Murray, that the relationship, whatever it was, was no doubt
13 helpful in amending the contracts during the month of February
14 as they had been changed?

15 A Yes.

16 Q In addition, in or about that same conversation or
17 series of conversations, Mr. Murray inquired of you whether
18 or not -- withdrawn.

19 Last night in my office, did you tell me that you had
20 a recollection that on that same day, March 19, 1971, Mr.
21 Murray inquired of you whether or not the Stirlings were
22 using stock, or giving a second mortgage in respect of this
23 same Kabeth land transaction?

24 A Yes.

25 Q You also told me, did you not, that you told Mr.

1
2 Murray that you didn't know the answer?

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3 A Yes.

4 Q That Mr. Yanowitch was the person who had most of the
5 details in respect of this transaction?

6 A Yes.

7 Q And that you had made a similar prefatory remark with
8 respect to the earlier inquiry about who the buyers were
9 and the relationship between the Grago company and Homex?

10 A Yes.

11 Q In addition, you told me that at a point thereafter
12 you went to David Stirling and asked him in substance, if not
13 words, if he had given a second mortgage, or stock to the
14 buyer in regard to that transaction?

15 A Yes.

16 Q In addition, you also thought you may have added
17 the words "or anything like that" when you raised that sub-
18 ject and questioned Mr. Stirling in that regard?

19 A Yes.

20 Q Finally, you told me that thereafter you reported
21 back to Mr. Murray that you had checked with David Stirling
22 and his answer was no?

23 A Yes.

24 Q On that score?

25 A Yes.

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2 Q This morning I asked you, did I not, if you were sure
3 about whether Mr. Murray had used the expression "second
4 mortgage", and I explained that the transaction didn't even
5 have a first mortgage associated with it, and you told me you
6 were uncertain if he used those words, or that precise
7 financing concept?

8 A Yes.

9 Q I also asked you if he could have asked the open
10 ended question how are they financing this transaction, where
11 did the down payment come from, or whether he asked the closed
12 in narrowing question they aren't giving stock or a second
13 mortgage, are they, and you told me that your recollection
14 doesn't permit you with precision to recount whether it was
15 the former or the latter?

16 A Yes.

17 Q Directing your attention backwards in time to this
18 same Kabeth land transaction, it is a fact, is it not, that
19 you had had a series of conversations with Harris, Kerr,
20 Forster, and with other company officials, including specifi-
21 cally David Stirling and Harold Yanowitch, on the subject
22 of whether or not the profits to be reported on the sale of
23 that land had to be reduced by the imputation of interest?

24 A Yes.

25 Q And you have a recollection of having been asked by

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2 David Stirling to calculate the profits to be reported on
3 both the imputed basis and the unimputed basis and handing
4 him or otherwise directing some employee to hand him the
5 comparative figures?

6 A Yes.

7 Q And you retain a recollection, do you not, that at
8 some point Harold Yanowitch said to you in response to your
9 repeating your opinion that imputation of interest would
10 have to be done, that it might not have to be, and that you
11 should call Bill Murray and see what he thinks?

12 A Yes.

13 Q You have a recollection, do you not, that thereafter
14 you placed a call to Bill Murray and asked him what he
15 thought, and in substance, if not words, he said that he
16 did not believe that the imputation of interest would be re-
17 quired?

18 A Yes.

19 Q Do you have a recollection that you then reported
20 back to Mr. Yanowitch that conversation, and Yanowitch's re-
21 sponse was "Did you get it in writing?" and you said you
22 had not thought to ask for it in writing; that you then
23 went back and made a second phone call from Mr. Murray and
24 requested a writing, and he agreed to provide you with one?

25 A Yes.

1 Q Do you retain a recollection today that on or about
2 March 19, 1971 on the occasion of Mr. Lowengrub's visit that
3 the decision to impute interest, or the reversal of the
4 decision which Mr. Murray had previously expressed to you,
5 both orally and in writing, followed Lowengrub's review of
6 the transaction?
7

8 A Yes.

9 MR. MacDONALD: I don't think it is necessary
10 for the reporter to take down each of the words on
11 document 38290 to 295, but I now propose to read it
12 in its entirety to the Grand Jurors, and then to ask a
13 series of question. If you will simply note that I
14 read from the document.

15 (Document read.)

16 Q Mr. Schulz, you told me in the hallway during the
17 last recess, did you not, that you have a recollection to-
18 day that in or about early December, 1971, on reading the
19 SEC report Form 10Q for the first quarter sales that had
20 been handed to you by Mr. Bartlett, you noted there was no
21 disclosure to the investor that the Virgin Islands contract
22 had been written off during that quarter?

23 A Yes.

24 Q And you said so to Bartlett?

25 A Yes.

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2 Q Your best recollection today is that Mr. Bartlett
3 responded in substance, if not words, that PM & M had told
4 him that it was unnecessary to make such a disclosure?

5 A Yes.

6 Q In respect to your statement on page 88291, and I
7 quote, and this refers before I quote, to the \$832,000 new
8 plant billing, you wrote "I had no knowledge that this
9 billing was not proper."

10 It is the fact, is it not, that you have previously
11 told me, and you reaffirm under oath before this Grand Jury,
12 that you participated in a conversation with Harold Yanowitch
13 and Rubel Phillips with respect to this subject matter?

14 A Yes.

15 Q In the course of that conversation, or on its con-
16 clusion, perhaps out of Mr. Phillips' presence, Mr. Yanowitch
17 said to you in substance, if not words, that the billing
18 was proper even if they had to get a subcontractor involved
19 in the process?

20 A Yes.

21 Q You had asked him to provoke that answer if there
22 was some problem or difficulty in respect of this billing?

23 A Yes.

24 Q It is your testimony that you then thereafter returned
25 to your --- withdrawn.

1
2 It is your testimony that thereafter you had a con-
3 versation with David Stirling with respect to the same sub-
4 ject?

5 A Yes.

6 Q And would you tell us, please, what it was Mr.
7 Stirling said to you in this regard, please summarize your
8 recollection of his remarks?

9 A David Stirling went to talk to Harold Yanowitch,
10 went into his office, and I returned to mine. A few minutes
11 later David Stirling came into my office and said "Harold
12 was wrong, he misunderstood, that billing is okay the way it
13 is. I straightened him out."

14 Q I think you omitted, and I may have misled you, to
15 tell us what you said to Mr. Stirling to provoke him to see
16 Yanowitch?

17 A I asked him what was Harold saying, was there a
18 problem with the billing.

19 He made no comment to that, he just walked into
20 Harold Yanowitch's office.

21 Then, when he returned, he said that Harold was
22 wrong, and that he had straightened him out.

23 Several hours later, but I believe the same day,
24 Harold Yanowitch also stopped into my office and said that
25 he had been mistaken and that David Stirling had indeed

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2 straightened him out and it was all right.

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3 Q Directing your attention to the paragraph in this
4 writing on page 88293 in connection with the SEC letter you
5 wrote and I quote, "Through inexperience I was not aware of
6 any requirement to elaborate further, or to recite exceptions.

7 It is the fact, is it not, Mr. Schulz, that at the
8 time of the writing of the SEC letter referred to in late
9 June or early July, 1971, you had previously had some ex-
10 perience with Stirling Homex's previous sale of stock and
11 the drafting of the prospectus and its amendment which had
12 consumed the fall of 1969 and the first six months of 1970?

13 A Yes.

14 Q Now, those two sentences which I have singled out of
15 this document, are two that you and I discussed before your
16 appearance here this morning in which I called to your at-
17 tention certain additional facts to refresh your recollection
18 that you may have overstated the case somewhat in those two
19 particulars, right?

20 A Yes.

21 Q And we have not yet had an opportunity to review all
22 of the representations that are set forth in this document
23 against the documentary evidence and the verbal evidence
24 which this Grand Jury has heard and read, have we?

25 A No.

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2 Q It may stand correction in one or another regard in
3 light of those subsequent reviews of documents which you
4 haven't looked at for five years, or recollections of other
5 persons that you may never have heard?

6 A Yes.

7 MR. MacDONALD: Mr. Foreman, will you ask Mr.
8 Schulz to wait outside in the hallway for a moment
9 while I ask the Grand Jurors if there are any additional
10 inquiries to be put to you on this occasion?

11 THE FOREMAN: Mr. Schulz, you're excused tempor-
12 arily.

13 (Witness leaves room, then returns.)

14 Q Mr. Schulz, directing your attention to that Sunday
15 meeting on Professor Mauriello's poolside, into that portion
16 of the meeting that I directed your attention earlier in
17 which Mr. Murray asked you if the Stirlings were honest.

18 A Yes.

19 Q Do you recall what response you made to him on that
20 occasion?

21 A Yes, I told him I thought they were honest, but very
22 ambitious.

23 MR. MacDONALD: We have no further questions of you.
24 Mr. Foreman, if you will excuse Mr. Schulz with
25 our thanks.

E. Schulz 7/16/76

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APP. 95

THE FOREMAN: You're excused, Mr. Schulz, thank

you.

(Witness excused.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APP. 96

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UNITED STATES OF AMERICA :

-against- :

DAVID STIRLING, JR., et al. :

Defendants. :

----- x

76 Cr. 685

MEMORANDUM

Re: Motion of Edwin J. Schulz

FRANKEL, D.J.

Defendant Edwin J. Schulz moves for several kinds of relief. The motion is resolved as follows:

1. The movant seeks suppression of grand jury testimony he gave voluntarily, for his own good, at a time when he had agreed to plead guilty to one count. The movant changed his mind about pleading. Now he says Fed. R. Crim. P. 11(e)(6) forbids use of his sworn testimony. The argument strains the language and purport of the Rule. The position, especially in the circumstances of this case, has no basis in policy or significant precedent. The Government never agreed that the sworn testimony would be suppressed under any circumstances. The Rule compels no such result. The motion to suppress will be denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APP. 97

-----X

UNITED STATES OF AMERICA	:	76 Cr. 685 (MEF)
- against -	:	
DAVID STIRLING, JR., et al.,	:	<u>NOTICE OF MOTION</u>
Defendants.	:	

-----X

SIRS:

PLEASE TAKE NOTICE that, upon all the prior proceedings herein, and the Memorandum of Law submitted herewith, the defendant Edwin J. Schulz will move, at such time as the Court may direct, at Room 1106, United States Courthouse, Foley Square, New York, New York, for:

- (1) reconsideration of Mr. Schulz' motion to suppress his grand jury testimony;
- (2) an order suppressing at least the four questions on page 22 of Mr. Schulz' grand jury testimony, *at least on the Government's direct case; and*
- (3) an order pursuant to Rule 106 of the Federal Rules of Evidence requiring the following excerpts of Mr. Schulz' prior testimony to be presented to the jury contemporaneously with the excerpts offered by the Government:

(a) May 30, 1973: page 52, page 59 line 3 to line 21, page 61 line 5 to page 62 line 21;

(b) July 28, 1973: page 619 line 3 to page 620 line 19;

(c) August 23, 1973: page 773 line 19 to page 774 line 6, page 777 line 17 to page 779

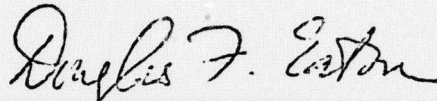
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line 14, page 781 line 18 to page 783 line 24.

(Copies annexed hereto).

Dated: New York, New York
December 20, 1976

Yours, etc.,



DOUGLAS F. EATON
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New York, New York 10022
759-1919

Attorney for Defendant
Edwin J. Schulz

To:

Hon. Robert B. Fiske, Jr.
United States Attorney
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Attention: W. Cullen MacDonald, Esq.

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APP. 99

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UNITED STATES OF AMERICA

3

vs.

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DAVID STIRLING, JR., et al.

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6

New York, January 6, 1977,

7

9:00 a.m.

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Trial resumed.

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(In open court; jury not present.)

11

EDWIN SCHULZ, a defendant herein,

12

called as a witness, being first duly sworn,

13

testified as follows:

14

DIRECT EXAMINATION

15

BY MR. EATON:

16

Q Mr. Schulz, I would like to direct your

17

attention to late March of 1976. Did you tet a

18

telephone call from Mr. MacDonald?

19

A Yes.

20

Q And you were at your home in Lancaster,

21

Pennsylvania?

22

A I was at work that day in Lancaster.

23

Q Prior to getting this phone call had you

24

traveled to New York on approximately six occasions

25

and talked with Mr. MacDonald and others?

1 hpa2

Schulz-direct

2 A Yes, I did.

3 Q In this telephone conversation around
4 late March of 1976 what did Mr. MacDonald say to you?

5 A Mr. MacDonald informed me with that phone
6 call that he was going to recommend indictment to the
7 grand jury.

8 Q Indictment of whom?

9 A Of Ed Schulz.

10 Q After that telephone call from Mr. MacDonald
11 did you call Mr. George Miller?

12 A Yes, I did.

13 Q Was he your attorney at that time?

14 A Yes, he was.

15 Q Did you tell Mr. Miller what Mr. MacDonald
16 had just told to you?

17 A Yes, I did.

18 Q What did Mr. Miller tell you about that
19 information Mr. MacDonald had given to you?

20 A He advised me at that point not to have
21 any additional contact with Mr. MacDonald and told me
22 that he would then speak directly with Mr. MacDonald
23 himself.

24 Q Did Mr. Miller give you any interpretation
25 of the statement that Mr. MacDonald had made to you

hpa3 Schulz-direct

that his office had decided to recommend your indictment?

A I'm sorry. Would you repeat the question.

Q Did Mr. Miller give you any interpretation of the meaning of Mr. MacDonald's statement when Mr. MacDonald had said to you the U. S. Attorney's office had decided to recommend your indictment?

A Yes. He informed me that in effect Mr. MacDonald was the grand jury and that whatever Mr. MacDonald recommended is what would happen.

Q After Mr. Miller told you to stop talking with Mr. MacDonald, did you have other conversations with Mr. Miller?

A Well, yes, we spoke on the phone on a couple of occasions.

Q And did you have further conversations over the phone with Mr. MacDonald?

A Yes, I did.

Q Did Mr. Miller inform you that he met with Mr. MacDonald on or about May 11, 1976 in New York City?

A Yes, he told me he did.

Q And after that did you yourself come again to the U. S. Attorney's office on or about June

1 hpa4 Schulz-direct

2 10th and June 20th and July 3rd?

3 A Yes, I made several trips.

4 Q Could you tell Judge Frankel just in very
5 general outline form what were the discussions, what
6 was the purpose of the discussions, as you understood
7 it, when Mr. Miller first came by himself and then you
8 came on the next three occasions?

9 A As I understood it, the purpose of Mr. Miller's
10 trip was, first of all, to attempt to talk Mr.
11 MacDonald out of an indictment, and then after that, my
12 trips up were basically plea bargain trips, and Mr.
13 MacDonald had expressed a desire that I be a government
14 witness against Mr. Murray and Mr. Horn of Peat,
15 Marwick & Mitchell, and on those trips we discussed
16 Peat, Marwick & Mitchell's involvement in the Stirling
17 Homex affairs and also discussed the scope of the indict-
18 ment and whether there was an opportunity to, for
19 example, have the charge reduced to either a mis-
20 demeanor or some other section of the law.

21 Q I take it there never was an agreement
22 to reduce the charge to a misdemeanor, is that fair
23 to say?

24 A Yes.

25 Q Specifically during the meeting with Mr.

1 hpa5

Schulz-direct

2 MacDonald on July 3rd was Mr. Miller present along with
3 you?

4 A Yes, on one occasion Mr. Miller came up
5 with me to speak to Mr. MacDonald.

6 Q On that occasion did you and Mr. Miller
7 try to find out from Mr. MacDonald exactly whether or
8 not Mr. Murray or Mr. Horn would be named as defend-
9 ants?

10 A Yes, we did.

11 Q Is it fair to say that Mr. MacDonald said
12 he could not tell you one way or the other whether
13 either of those men would be indicted by that grand
14 jury?

15 A Yes.

16 Q In that same meeting did you and Mr. Miller
17 try to find out exactly what the indictment would
18 charge against Ed Schulz?

19 A Yes, we did. We had a discussion on
20 that specific subject.

21 Q There, again, is it fair to say --

22 MR. MAC DONALD: Objection to form for
23 this meeting of July 3rd. We would ask Mr. Schulz²
24 best recollection.

25 THE COURT: Let's not lead. Just ask

1 hpa6 Schulz-direct

2 him what happened at the meeting and let him tell you.

3 MR. EATON: I'll try and focus it a little,
4 your Honor. I'm sure it will be focused again on
5 cross examination.

6 Q At the meeting on July 3rd, was there any
7 discussion about what particular incidents might be
8 charged in the indictment against you?

9 A Yes.

10 Q Could you tell Judge Frankel, to the best
11 of your recollection, who said what about that particu-
12 lar subject?

13 A I believe on that occasion Mr. Miller
14 expressed, and I also expressed my belief, that the
15 only specific item in there was the Dave ^{Christman} Krissman in-
16 cident, and we asked -- I specifically asked Mr.
17 MacDonald, "What are you going to put into the indict-
18 ment?" Mr. MacDonald mentioned only two other
19 things: an \$832,000 billing and the ^{File 2} file incident.
20 He mentioned those things, which I objected to, and I said
21 I didn't feel guilty on those two points. Mr. MacDonald
22 said he could not specify what would be in the indict-
23 ment but that he was considering those other two
24 items.

25 Q And did you or your attorney indicate that

1 hpa7

Schulz-direct

2 you would offer to plead guilty to a felony charge?

3 A Yes.

4 Q What did you understand that felony charge
5 would be?

6 A I understood that the felony charge was my
7 pleading guilty to one specific incident within a much
8 broader count of conspiracy.

9 Q And when you say one specific incident,
10 which incident do you refer to?

11 A That's the ^{Christman} Krissman incident.

12 Q Mr. Schulz, I would like to show you a
13 letter dated July 8, 1976. This is a copy of
14 the same letter that is already in the motion papers.

15 At this meeting of July 3rd did Mr. MacDonald
16 say that any agreement would have to be reduced to
17 writing?

18 A Yes, he did.

19 Q After the July 3rd meeting you went home
20 again?

21 A Yes.

22 Q Did you have a further conversation with
23 your attorney, George Miller?

24 A Yes, I spoke to Mr. Miller.

25 Q Was this over the telephone or in person?

1 hpa8 Schulz-direct

2 A This was over the phone.

3 Q Could you tell Judge Frankel briefly what
4 that conversation was with Mr. Miller?

5 A I had several conversations with Mr.
6 Miller. I don't know specifically what you are
7 referring to.

8 Q Could you tell, in the best chronological
9 order you can, any conversations you had with Mr. Miller
10 between July 3rd and July 15th, when you next returned
11 to New York?

12 A I would say generally in those conver-
13 sations Mr. Miller and I discussed how to make the
14 best out of a bad situation. Mr. Miller recommended
15 that I go through with the guilty plea and he recom-
16 mended that I go to New York, enter a plea of guilty
17 and be a good witness for the government.

18 THE COURT: As you go along here, Mr.
19 Eaton, I wonder a little bit about a couple of letters
20 which have been withheld.

21 MR. EATON: I will show your Honor
22 the documents.

23 Your Honor, Mr. Miller sent me six
24 documents -- excuse me; seven documents, which he
25 labeled with a typewriter "Document A" through "Docu-

hpa9

Schulz-direct

1 hpa9 Schulz-direct
2 ment G," and I will hand up those plus his cover let-
3 ter dated October 6, 1976. And the cover letter
4 might quickly show your Honor that the documents on
5 which we claim privilege were documents C, F and G,
6 and the other ones we did turn over to Mr. MacDonald.

7 I might say with respect to document G,
8 we haven't gotten there in our chronology, but although
9 I told Mr. MacDonald I felt document G was privileged,
10 I did tell him that the subject of document G were
11 errors that Mr. Schulz told Mr. Miller he thought
12 he may have made in his grand jury testimony, and
13 despite the fact that Mr. Miller's affidavit says that
14 Mr. Schulz told him that one of the errors was this
15 "I lied" business, despite that, and that I did tell
16 Mr. MacDonald the letter, document G, from Mr.
17 Schulz to Mr. Miller, does not include any reference
18 to the claim that the "I lied" testimony was in error.
19 I told Mr. MacDonald that much, which I think is all
20 he needs to know, and I don't think the other possible
21 errors discussed by Mr. Schulz in his letter to his
22 attorney are pertinent to this notion. But
23 that's getting a little ahead of ourselves.

24 THE COURT: All right.
25

1 hpal0

Schulz-direct

2 BY MR. EATON:

3 Q On the evening of July 15, 1976 did you
4 have another meeting with Mr. MacDonald?

5 A Yes, I did.

6 Q And at that point did Mr. MacDonald show you
7 a copy of this letter that you have in front of you,
8 dated July 8, 1976?

9 A Yes, he did.

10 Q Did Mr. MacDonald state that the ribbon
11 original of that letter had not yet come back in the
12 mail from George Miller but that George Miller had
13 signed his name on it?

14 A Yes, he told me that.

15 Q At that point, while you were in Mr.
16 MacDonald's office, were several attempts made to
17 telephone George Miller?

18 A Not to my recollection. There may
19 have been one attempt, but I think that was all.

20 Q Did Mr. MacDonald show you a copy of that
21 letter of July 3th?

22 A Yes, he did.

23 Q Did you read it?

24 A Yes, I did.

25 Q Did you agree that you would be bound by

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Schulz-direct

the terms of that letter of July 8th?

A Yes.

Q You didn't sign it but you definitely agreed to it, is that right?

A Yes.

Q Did you then have a discussion with Mr. MacDonald about testifying in the grand jury the following day?

A Yes, I did.

Q And during that discussion was there any discussion of prior statements that you had made throughout the course of the investigation of Stirling Homex?

A Yes, there were.

Q And could you tell Judge Frankel, to the best of your recollection, what that conversation was on that particular subject, your prior statements?

A Mr. MacDonald said to me in effect that he wanted me to admit that I lied in previous testimony and that the primary purpose of this was because I was going to be a government witness, that I would be testifying at this trial as a government witness, and that to soften the cross examination it would be necessary I admit I lied right off the bat in his

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Schulz-direct

initial examination. I objected. I didn't feel that I had lied and Mr. MacDonald proceeded to pull out some previous testimony and he showed me one or more questions, a large majority to which I said no, I didn't feel they were incorrect testimony.

Q If I can stop you there. To the best of your recollection, what prior statements did Mr. MacDonald show you? First of all, let's categorize them by where you gave the statements.

A These were to I believe wehat's referred to as the Pomerantz civil action. I gave those in New York City

Q Let me show you the excerpts from the Pomerantz statement, which is the excerpt that Mr. MacDonald has included in proposed Government's Exhibit 381, which consists of pages 73 through 82. That's a Xerox copy.

MR. EATON: Your Honor, Mr. MacDonald and I are agreed that the handwriting corrections appearing there were made by someone in the U. S. Attorney's office after this July meeting.

Q Except for the handwritten notes, to the best of your recollection, were you shown some or all of these pages by Mr. MacDonald?

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Schulz-direct

A Yes, a few of these pages.

Q As you and Mr. MacDonald were looking at that document, could you tell Judge Frankel what conversation took place, specifically about that Pomerantz document?

A Well, the specific conversation in relation to that document was Mr. MacDonald was showing me these questions and saying wasn't this an untrue statement, to which I said no several times.

THE COURT: If I may, I'm not terribly interested in that. I am mainly interested in hearing from Mr. Schulz on his grand jury testimony and why he gave it and the state of mind. For example, there is a statement in Mr. MacDonald's affidavit, Mr. Schulz, you indicated at some time before you went to the grand jury you were still hoping what you said there might persuade those in authority not to indict you. Is that true or false?

THE WITNESS: That's false, sir.

MR. EATON: Let me proceed to the grand jury transcript, your Honor. I'll try to be brief.

THE COURT: I have read through that.

MR. EATON: I think I can move to what your Honor indicated was the key point in a previous

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Schulz-direct

session of this trial.

Q Mr. Schulz, isn't it a fact that you were asked this question by Mr. MacDonald near the start of your grand jury testimony and gave this answer:

"Q So when you make answers today and waive your right of silence, you appreciate the possibility that some day those answers can be used against you?

"A Yes"?

A Yes he asked me that.

Q When you were in the grand jury, Mr. Schulz, what was your thinking on that subject? Would you tell Judge Frankel in your own words?

A I didn't anticipate of course any additional action because I felt, you know, the trial was in effect the end of the Stirling Homex matter. I was answering those questions with the full intention of entering a guilty plea and felt that I had to give the answers to Mr. MacDonald which he expected from me because he would play an important role in the report that went to the sentencing judge.

Q Mr. Schulz, did you understand the possibility that after you entered a guilty plea the sentencing judge might read or hear about your admissions in the grand jury?

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Schulz-direct

A Yes, I assumed that he would at least have access to them.

Q Let me go to page 22 and ask you one question and answer. Mr. MacDonald asked the question --

MR. MAC DONALD: Have we exhausted the possibilities referred to -- have we exhausted the witness' testimony concerning those possibilities about the use of his testimony against him?

MR. EATON: I think we have.

THE COURT: You may cross examine.

Q Question by Mr. MacDonald:

"Q It is the fact, is it not, that you have previously given false statements to officials connected with the bankruptcy of Stirling Homex to SEC officials, to the United States Attorney's office, and investigators associated with it and to private civil lawyers with whom you have spoken in regard to the affairs of Stirling Homex Corporation?"

Now, as you sat there in the grand jury and at every time up to and including July 16th, when you were in the grand jury, did you honestly believe that you had lied to any of those investigators?

A No, I did not.

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Schulz-direct

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Q And did you realize that you were under oath in the grand jury?

A Yes.

Q And did you feel by giving a yes answer to that question you were violating that oath and committing perjury in the grand jury?

A Yes. I was very, very uncomfortable with that answer. I felt that I was in effect lying to the grand jury by saying that. However, I also understood that there was no question in Mr. MacDonald's mind that I was telling the truth and I thought it was more important that Mr. MacDonald be able to say or would say that Ed Schulz has been telling the truth, at least since the time he appeared at the grand jury and, in effect, that was my motivation.

Q Were you acting from a selfish interest?

A Yes.

Q To try to get the lightest possible sentence you could?

A Yes.

Q Did you feel that by admitting that you had lied to previous investigators this would help you when the sentencing judge found out about that?

A Well, I assumed that that would be detrimental.

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Schulz-direct

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However, I still felt the most important aspect of the whole situation was that I needed the good faith of Mr. MacDonald, that he could withdraw the entire agreement if he thought that I didn't answer questions the way he expected me to answer them, and --

THE COURT: Let me ask you this: You said before that he, Mr. MacDonald, had told you that part of this strategy he was employing was to make you a more effective witness at some later time against other people. Is that what you are saying?

THE WITNESS: Yes, sir.

THE COURT: So that you gave him these yes answers in the belief that that would help the government in its pursuit of other people?

THE WITNESS: Yes, your Honor?

THE COURT: And in that understanding you gave what you thought were false answers under oath; is that what you are saying?

THE WITNESS: Yes, your Honor.

MR. EATON: I have no further questions, Your Honor.

THE COURT: Mr. MacDonald.

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hpa18

Schulz-cross

CROSS EXAMINATION

BY MR. MAC DONALD:

Q Between the time you left my office on the evening of July 15th and your reappearance on July 16th did you make any efforts to contact George Miller?

A Yes, I did.

Q Did you succeed?

A Yes, I did.

Q Did you discuss with him the subjectt that we had pursued in my office and, in particular, the pending question to you about whether or not you had previously given false statements to the Homex questioners?

A I am not absolutely certain I did that. I know I discussed it with him at some time. Whether I could pin it down to that very night or not I'm not sure. I possibly did or probably did.

Q On your return to my office the following morning, prior to going to the grand jury, did you tell me that the answer to the question about prior false statements was that, yes, you had made such statements?

A I don't recall you asking that specific question.

Q Is your recollection refreshed that it was

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Schulz-cross

not put to you for the first time that day in the grand jury but it had been the subject of some discussion before commencement of the grand jury investigation?

A Yes, probably the night before.

Q I would like you to tell me and his Honor what your best recollection is of your and Mr. Miller's conversation with each other with respect to answering that question and the obligation of the oath in respect of your answer --

THE COURT: You are talking about the question about the false statements?

MR. MAC DONALD: I would just as soon we not pursue that further.

Q At the meeting of July 3rd, Mr. Schulz, 1976, it was, was it not, I think you told Judge Frankel, your and Mr. Miller's express purpose to find out if there could be some agreement about the scope of the charges that would be set forth in the conspiracy count which named you and your responsibility in that count?

A Yes.

Q And the reason you put that question was that you and he had consulted with David Cogan, a

former assistant United States attorney who had been appointed by the magistrate to represent you and you appreciated the possibility that some judges might take into account in sentencing you only those charges set forth in that count?

A Yes, I guess that would have been my impression.

Q And if it could be limited in some fashion it would be to your advantage and that is why you asked if it could be limited?

A Yes.

Q It is the fact, is it not, that I declined to agree to a limitation out front of anything beyond the Krissman incident, but we did agree at least that you were prepared to have it in the conspiracy count for the sentencing judge to read?

A Yes.

Q That lasted about five hours, is that, you arrived at 10 and left at 3, approximately?

A I don't recall exactly. We did spend time waiting around.

Q The last hour was spent as to your relationship with the auditors?

A Yes.

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Schulz-cross

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Q We took out a boiler-plate form agreement and in your presence discussed whether or not the government's obligation to report to the sentencing court when cooperation began could include a report that it began as early as December, 1975; do you remember that?

A Yes, I remember Mr. Miller discussing that.

Q Do you remember that I declined to report that it began at that early date since it hadn't begun as of the date of July 3rd, and that's what we were talking about in terms of your becoming a cooperating government witness?

A I don't recall you declining. I recall you saying that you didn't determine that. That's my recollection of the conversation. You did hedge from admitting or agreeing.

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Schulz - cross

Q Beyond those two matters that I have referred to, the conspiracy concerning Mr. Schulz' role and a report to the Court on the day that the cooperation commenced, it is the fact, is it not, that no further discussion occurred in your presence with respect to any other of the boilerplate terms by me?

A I don't really understand when you speak of boilerplate terms and all those things. I don't understand the question.

Q The form of the agreement we had consisted of several pages with several alternate provisions. My question to you is do you recall in your presence the Government interpreting any of those provisions in any fashion?

A No, I don't recall.

Q After you left my office did Mr. Miller interpret any of those provisions in private to you?

A We had very limited discussion on this document, extremely limited, and, as I recall it, Mr. Miller did not go into that in any great detail, and the first time that I really addressed myself to that agreement was in your office the night before I testified.

Q It is the fact, is it not, then, that neither the Government nor Mr. Miller advised you that the only

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Schulz - cross

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circumstance under which your grand jury testimony could be used would be if you were to make false statements during the course of your cooperation?

MR. EATON: Objection to the form. Does it include oral advice or the written advice as well.

THE COURT: I suppose it includes everything, doesn't it?

MR. MacDONALD: Yes, sir.

A I recall quite frankly no conversation with Mr. Miller regarding those provisions, other than the fact that "Tell the whole truth when you testify to the grand jury or this agreement can be withdrawn."

Q I would like to direct your attention specifically on page 88297 to the condition which was read:

"It is further understood that Mr. Schulz must at all times give complete, truthful and accurate information in testimony and must not commit any further crime whatsoever."

Do you recall discussing with either the Government or Mr. Miller that last condition about an undertaking not to commit any further crime whatsoever?

A No, I don't recall discussing that sentence.

Q You understood, did you not, from the earliest

visits to the U. S. Attorney's office your right under the Fifth Amendment to decline to answer questions if you decided to exercise it?

A Yes, I did.

Q It is the fact, is it not, that in later sessions your understanding of that right never changed, even if the litany was not repeated in the beginning?

A Yes, I understood that. However, once I was informed that I was going to be indicted I felt my best interests then were to disclose as much information as possible, particularly in reference to Peat Marwick auditors or anything else where you asked the question.

THE COURT: Mr. MacDonald, I think for my purposes the cross has probably gone far enough.

MR. MacDONALD: If it is helpful to the Court, we would like to press our right to have a look at those letters if they --

THE COURT: Well, I don't know what you mean "If it is helpful to the Court." I have looked at them and if they were useful on this motion I'd have the benefit of them, actually, but I don't think they are especially useful at this time, so I will deny your application.

MR. EATON: I forgot one question.

THE COURT: All right.

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Schulz-redirect

2033

INDIRECT EXAMINATION

MR. EATON:

Q Mr. Schulz, when and why did you first consider backing out of your agreement to plead guilty?

A I can answer that best by saying after I saw the indictment and after our conversations with Mr. MacDonald in which he had -- we agreed upon the Christman incident and had only mentioned two others, and I saw the indictment in which I was listed as having arranged land sales and the Greater Gulf Coast contract and several other areas; which I had never admitted to and had been informed by Mr. Miller that Mr. MacDonald did not believe I had been involved in those areas, and I saw the scope of the indictment. I found that to be very, very upsetting.

In addition, the Government had failed to indict or list as co-conspirators Peat, Marwick & Mitchell or any of its auditors, and I thought that was quite unjust and unfair and I was very upset.

MR. EATON: I have no further questions.

THE COURT: Thank you, Mr. Schulz.

(Witness excused.)

THE COURT: I want to ask a couple of questions and then I am going to rule on this area.

Mr. Eaton, first of all, I am going to have returned to you these documents that I will allow you to withhold from Mr. MacDonald.

Now, on this letter agreement of July 8, 1976 there is a statement of understanding that if Mr. Schulz commits any further crimes or the U. S. Attorney judges that he has given false testimony, whether it is false or not, "Or has otherwise violated any prohibition in this agreement, this agreement shall be null and void and the information provided by Mr. Schulz may thereafter be used against him."

I guess I have wondered from the beginning, when the first undertaking in the agreement is that Mr. Schulz would plead guilty, why the agreement has not been violated when the very first and central undertaking is withdrawn, and I would like you to speak to that, Mr. Eaton.

MR. EATON: I don't think the proper word is "violated," because I don't think the Government could have written into this agreement a clause preventing the back-out.

THE COURT: Of course not. It could agree with Mr. Schulz.

MR. EATON: That is the Government?

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THE COURT: Right, could agree with Mr.

schulz. What happens if and when he backs out?

MR. EATON: It could have, but it didn't.

THE COURT: It is exactly what is written and what I have just read to you. The agreement was that he plead guilty, and then a lot of other things would happen. It seems to me, unless you claim a defendant can never violate a plea bargain, and I don't think anybody has ever suggested that, the most central part of his obligations under the plea bargain is to plead. Everything else may be interesting and important and useful, but the centerpiece is the plea, and I don't understand why, granting he has the right, like Holmes' bad name or good name, if you break a contract certain consequences happen, you don't get executed or sent to prison, but you may have to pay damages -- this agreement spells out what happens if he violates it. I don't know that isn't pretty much the end of it, the answer for this purpose.

MR. EATON: I see the clause, your Honor, is pointing to, "Otherwise violated any provision of this agreement."

I don't think anyone reading that would have understood exactly what it meant, except that it was sort

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of a catch-all emphasizing the Government's superior position in writing this contract. I don't think anyone would have said that was fair notice to Mr. Schulz that anyone was discussing the possibility of backing out.

THE COURT: Let me ask you this, and as a lawyer we have to look at this and see what it means:

Suppose you were advising a client about this contract and he said, "Listen, suppose I change my mind after a while and decide to back out, can they use this testimony against me?"

Would you have told him no, after reading that clause?

MR. EATON: I honestly don't know what I would have told him unless I consulted Rule 11-E.

THE COURT: Suppose the agreement said: If I decide to withdraw my guilty plea you may use this testimony against me.

Then would you look at Rule 11-E and say:

Well, that doesn't matter because Rule 11-E says they can't?

MR. EATON: I certainly think that would be a very difficult thing to argue, that is right.

THE COURT: I think so.

MR. EATON: Now, if I can go on, my whole point,

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your Honor, is that no one talked about Rule 11-E. No one talked about the possibility of backing out, and Mr. Schulz says he wasn't thinking of backing out. No one was toying with this agreement and --

THE COURT: I know he wasn't thinking of backing out. People don't think of backing out of contracts when they make them. That is why we have all those books.

Here is the contract, an agreement, a bargain, and he backed out of it. That is what breaking a contract is.

Mr. MacDonald, do you disagree with that? How would you read this document?

MR. MacDONALD: No, sir. I think our original papers said that the contract was breached at its entry in several respect, and we would agree that not only the false statement to the grand jury but the ultimate refusal also constituted a violation.

THE COURT: I am going to adhere to the ruling on two grounds;

First, I persist in the view that the proposed reading of Rule 11-E is an unacceptable reading. I think the theory of the defendant with respect to this grand jury testimony has evil consequences. I don't mean that

loose that way, though I fully appreciate the desperate condition of somebody who faces indictment and is trying to help themselves.

Mr. Eaton, do you want to say something?

MR. EATON: Two things, your Honor.

On the evil consequences, the real danger is that testimony given under extreme inducement will be used against third parties, other defendants. I think that the normal way that that has to be tested is if those other defendants are wrongly indicted they must cross-examine the Government witness, and all of this can be brought out before the jury, the whole circumstance of how that witness was under pressure and thought that he had to give certain answers because he wanted someone at his office to stand up and say "Our office judges that he gave the truth," but in an adversary system that can be cross-examined into.

This case is unusual in that the person who got hurt was the person who was under the inducements and under the pressures.

THE COURT: We don't know who got hurt, but I'm not going to adjudicate on when he was and wasn't lying, whether here or before the grand jury. I'm saying that leaving him this kind of out gives him options to

SCS

move back and forth against other people, against the Government, as he sees fit, up to the point where he finally decides which way to jump. I'm not going to read through 11-E to give him that kind of option possibility.

MR. EATON: I would agree that that situation has been created and that that was going on in Mr. Schulz' mind, but, objectively, that situation is created by the Government's type of plea agreement. What I should suggest to be done to remedy this evil is that this Rule 11-E situation should be brought out in the open by the Government; that there should be some sort of a warning, a written statement in that plea agreement just as Judge Weinstein's suggestion is, which would enable anybody to know exactly what was going on in the agreement and it could be the subject of cross-examination, for example, by a third-party defendant.

THE COURT: You can't warn against all contingencies. I think a decision saying that you may insulate yourself in the way Mr. Schulz now wants to be insulated to be a one-way solution to this problem that would put all the benefit on one side and all the dangers on the other side, both with respect to the Government and other prospective defendants.

RCS

In any event, that is the way I'm going to rule.

Secondly, whatever Rule 11-E would say otherwise, I agree with the Government that the plea agreement in this case contemplated -- I haven't seen any testimony that anybody ever believed that it was -- that if the defendant breached it, represented that things said under oath and otherwise, presumably the truth could be used against him later on as the Government proposes to do in this case.

There are a number of other things that I think I'm about ready to rule on now. You were going to give me some weekend reading, that I think I would perhaps like to forego, on those additional transcript materials that you wanted read, Mr. Eaton. I'm inclined to believe that I ought to let them be read, but let the, be read by you as part of your defense case, because I don't think I ought to adjudicate on whose theory is right and what the probative force of this is. The Government believes that it doesn't prove the contrary of its contentions. You believe it does.

I'm going to let you put that to the jury on your case.

Then I come to the remaining question which

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really was the prior question in the order of your motion, your renewed motion, on the questions put to Mr. Schulz in the grand jury as to whether he had lied previously when he said yes.

I will not allow the Government to read them in its case in chief, but if you use those other transcript materials I will allow the Government to use them in rebuttal, because I think that states the logical order of the contentions and the relation in the materials, and the Government in rebuttal, if it sees fit, may attempt to put on any other evidence explaining what those naked yes answers by Mr. Schulz meant when he conceded having previously given false testimony.

Is that clear, whether it is correct?

MR. EATON: It is clear. The only thing I want to make sure is that your Honor understands that the additions which I will be reading on the defense case were given in the SEC and that Mr. MacDonald, A, never showed Mr. Schulz his SEC testimony, and, B, that Mr. MacDonald never asked a question about reassignments in the grand jury.

THE COURT: No, I'm not sure I did understand that as fully as I should.

Mr. MacDonald, those admissions by Mr. Schulz

that you elicited in the grand Jury of prior false statements did not relate, is that right, to the SEC testimony?

MR. MacDONALD: We did not review the night before the transcript of the SEC testimony of Mr. Schulz. Our review was of the Raichle transcript and civil action transcript.

We discussed as having taken the position verbally before the SEC on the subject of reassignments initially that the first quarter sales figures for the fiscal year issue had never been disseminated. They were purely internal figures, and the Government's later discovery was that they had been disseminated to investment bankers, commercial bankers and others and that those sales figures had included several projects which the Government discovered had been reversed and modules reassigned to other projects.

THE COURT: Let me ask you another question.

MR. MacDONALD: Yes, sir.

THE COURT: The statements, the prior statements that you had Mr. Schulz admit were false when he came before the grand jury, was the substance of those prior statements the same or overlapping with the SEC materials that Mr. Eaton now wants to read to the jury?

MR. MacDONALD: No, sir.

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THE COURT: Why not?

MR. MacDONALD: The parts he wants to read are the theoretical word parts.

THE COURT: You don't claim those theoretical parts he wants to read are false?

MR. MacDONALD: I think we do.

THE COURT: You do?

MR. MacDONALD: Yes, sir.

THE COURT: What I'm asking is this:

Is that theoretical matter in its substance the same as the theoretical matter or the matter that Mr. Schulz said he had testified falsely about when he gave testimony before the grand jury, or is it different?

MR. MacDONALD: It is related to the same question. It is the theory of the parts that I wanted to read of what are the historical facts. We simply don't review all of the possible --

THE COURT: It is in perfect logic, I think, from what I hear, but I'm still going to carve it this way:

I will not allow you to read it in your case in chief. I will let you urge that you can read it on rebuttal and then I will reconsider it depending on how the record looks at that time.

MR. MacDONALD: I don't mean to delay further

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proceedings this morning by taking a stab at persuading your Honor that there was no special coerciveness in --

THE COURT: It is not because of coerciveness. It is because I think the bare statement in your case in chief, "Yes, I have previously given false testimony" is unduly prejudicial, given the kind of questions to which those answers, those yes answers were responsive, and I am not going to decide whether it was under coercion or not. I don't think that for putting on your main case against Mr. Schulz you ought to be allowed to use that. It gives me some opportunity to reconsider and you can think about whether there is any more justification for it when you reach your rebuttal case, so I will withdraw the ruling about the rebuttal, leaving it to you to seek it again when you get to that.

MR. MacDONALD: It doesn't preclude us on cross, if Mr. Schulz takes the stand?

THE COURT: No, you may raise that as well if Mr. Schulz takes the stand.

Are we clear on that? We can collect these various papers and make them part of the Court's file, if at a later date they become necessary.

MR. MacDONALD: Yes, sir.

(Pause.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

DAVID STIRLING, JR., et al.,

Defendants.

AFFIDAVIT

76 Cr. 685 (MEF)

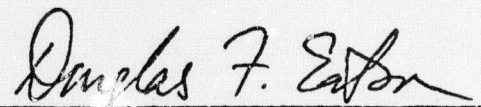
STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

DOUGLAS F. EATON, being duly sworn, says:

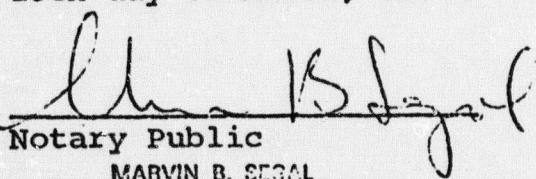
1. I am the attorney for defendant, Edwin J. Schulz.
2. I am submitting this affidavit so it will be part of the record on appeal. One of Mr. Schulz' appellate points will be the refusal to suppress his admissions concerning the "David Christman incident." In the absence of this affidavit, someone might assume that, even if those admissions had been suppressed, the Government could have elicited the same evidence by calling Mr. Christman.
3. I spoke with Mr. Christman on December 21, 1976 and he said he would answer my questions only if Assistant U. S. Attorney MacDonald were present. The next evening, Mr. MacDonald and I made a conference telephone call to Mr. Christman. I either quoted or paraphrased Mr. Schulz' grand jury testimony concerning Mr. Christman. (A copy of that portion of Mr. Schulz' testimony is annexed hereto).

4. I discussed Mr. Schulz' testimony that Mr. Christman "reported to [me] in the summer of 1970 that he had neglected to keep current on the necessary calculations in his division, that he had only recently done them." Mr. Christman said that about that time he was reporting to Richard Hurtt, who was Mr. Schulz' assistant. Mr. Hurtt kept asking Mr. Christman to re-write his monthly budget reports, and specifically to add to the "Comments" portions of those reports. At some point Mr. Schulz told Mr. Christman that the reports were not getting out promptly enough, and, therefore, he should submit them directly to Mr. Schulz.

5. I then discussed the key part of Mr. Schulz' testimony, that he told Mr. Christman to delay recording a calculation, which Mr. Christman had made in one or more such reports, and which had increased estimated costs by around a half million dollars. Mr. Christman said he did not recall this incident at all.


DOUGLAS F. EATON

SWorn to before me this
10th day of March, 1977.


Notary Public

MARVIN B. SEGAL
Notary Public, State of New York
No. 31-4320001
Qualified in New York County
Commission Expires March 09, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APP. 138

UNITED STATES OF AMERICA

- against -

DAVID STIRLING, JR., et al.,

Defendants.

76 Cr. 685 (MEF)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that, upon all the prior proceedings had herein, the defendant Edwin J. Schulz will move, at such time as the Court may direct, at Room 1106, United States Courthouse, Foley Square, New York, New York, for the following relief:

(1) Pursuant to the procedure recommended by United States v. Natelli, 527 F.2d 311, 327, 328 (2d Cir. 1975), cert. denied, 96 S.Ct. 1663 (1976), separate dismissals of the following specifications for insufficiency of evidence, and withdrawal of the following specifications from jury consideration:

(a) Paragraphs 10^{and 11} of Count One, and the same specification insofar as it is incorporated in all the other counts;

(b) Paragraph 12 of Count One, and the same specification insofar as it is incorporated in all the other counts;

(c) Paragraph 13 of Count One, and the same specification insofar as it is incorporated in all the other counts (dismissal of this specification is sought for the additional reasons that the evidence shows the alleged representation to be true, and that all of the words in Paragraph 13 after the word "because" are a non sequitur);

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(d) Paragraph 14 of Count One, and the same specification insofar as it is incorporated in all the other counts;

(e) Clause (b) of Paragraph 15 of Count One, and the same specification insofar as it is incorporated in the other counts;

(f) Clause (c) of Paragraph 15 of Count One, and the same specification insofar as it is incorporated in the other counts; and

(g) Paragraph 2 of Count Nine.

(2) A separate judgment of acquittal on each count because of the statute of limitations, since the evidence is insufficient to establish that Mr. Schulz committed any crime which continued beyond July 27, 1971.

(3) A separate judgment of acquittal on each count because of lack of venue, since the evidence is insufficient to establish that Mr. Schulz committed any crime in the Southern District of New York.

(4) In view of the testimony of Messrs. Garson, Kesel, Mauriello and Murray, and the anticipated testimony of Mr. Woods (see page 99 of his grand jury testimony, annexed to this Notice), an order admitting into evidence certain excerpts of Mr. Schulz' prior testimony (annexed to his previous Notice of Motion dated December 20, 1976) on Mr. Schulz' defense case, on the condition that the Government will not be allowed to introduce the four questions on page 22 of Mr. Schulz' grand jury testimony unless Mr. Schulz takes the stand.

Dated: New York, New York
January 17, 1977

Yours, etc.,

DOUGLAS F. EATON
745 Fifth Avenue
New York, New York 10022
759-1919
Attorney for Defendant
Edwin J. Schulz

APP. 140

SCHULZ' SUPPLEMENTAL REQUEST
TO CHARGE NO. 1

Withdrawal of Specifications

As to the defendant Schulz only, I have withdrawn from your consideration certain specifications which the Indictment originally alleged against him as parts of the scheme to defraud. Those specifications are contained in Paragraph 2 of Count Nine and in the following numbered paragraphs of Count One: Paragraphs 10 ^{and 11,} Paragraph 12, Paragraph 13, Paragraph 14, and Clause (b) and Clause (c) of Paragraph 15. Keep in mind that those paragraphs were incorporated by reference in each of the other Counts. I have withdrawn those specifications from all of the Counts as to the defendant Schulz.

You may not convict Mr. Schulz on the basis of any of the specifications which I have withdrawn. (And, of course, you may not convict him on the basis of the specification contained in Paragraph 16 of Count One, since that specification does not name him.)

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SCHULZ' SUPPLEMENTAL REQUEST
TO CHARGE NO. 2

Unanimity

Before you may convict Mr. Schulz, you must be unanimous as to at least one of the specifications against him. For example, if only some of you believe that he is guilty of that part of the alleged fraud which is charged in Paragraph 13, and the rest of you, but not all of you, believe that he is guilty of that part charged in Paragraph 15(a), you may not return a guilty verdict by adding two groups of jurors together. Unless all twelve of you unanimously find Mr. Schulz guilty as to at least one specific part of the alleged fraud, then you must acquit him.

United States v. Natelli, 527 F.2d 311, 324-25 (1975), cert. denied, 96 S.Ct. 1663 (1976).

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1-1156

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APP. 142

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UNITED STATES OF AMERICA :

-v- :

76 Cr. 685 (MEF)

DAVID STIRLING, JR. et al., :

Defendants. :

-----x

ANSWER OF THE UNITED STATES
TO DEFENDANTS' NATELLI
MOTIONS

Defendants have moved the Court to instruct the jury that certain paragraphs of Count One of the indictment have been withdrawn from their consideration in that count and in all other counts in which those paragraphs are incorporated and for a charge that the jury must be unanimous in deciding that a defendant was guilty of the charges in one or more particular paragraph or "specification" of the count being considered in order to convict the defendant upon that count. Defendants claim that different paragraphs of Count One should be withdrawn as to each of them depending upon the facts shown by the Government's case. The authority cited for these contentions is United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976).

The defendants do not argue the facts of the case in their submission to the Court. The government contends that the evidence supports each paragraph of Count One of the indictment so that assuming, arguendo, that each paragraph is to be considered separately, each paragraph should go to the jury on the facts. The Government is prepared to support this position through oral argument.

ARGUMENT

The charges in the Natelli trial differ in essential respects from those in this case. Natelli and his co-defendant Scansaroli were tried on a single count which alleged violation of 15 U.S.C. §§78ff and 78n, in that they made or caused to be made false and misleading statements as to material facts in a proxy statement filed with the S.E.C. There was no conspiracy count in the indictment against them and no count charging a scheme or artifice to defraud. There was no instruction requested or given charging a joint venture or scheme. In fact Judge Tyler gave only a minimal charge on aiding and abetting:

"If... you find that the defendant in question knew that the false or misleading data of a material kind were being placed in a proxy statement and then knowingly and intentionally did something to assist in this course of action you should find the defendant guilty."
Trial Tr. 2371.

The count on which Natelli and Scansaroli were tried contained two specifications of false and misleading statements in the proxy statement. While the jury was charged that it must be unanimous as to the count it was not charged that it had to be unanimous as to the specification. In reversing the Court of Appeals ruled:

"When there is more than one specification as a predicate for guilt, each dependant on particular evidence which is unrelated to the other, it would be sound practice to instruct the jury that they must be unanimous on a particular specification to convict. Since that was not done here and since we have found that Scansaroli was not culpable on [one] specification, ...we must reverse the conviction and remand for trial on [the other] specification alone."
At 325.*

In the present indictment Counts One and Three

* Natelli directly holds that it is not error not to give a charge explicitly requiring unanimity on the specifications of a count:

"We do not say it would be wrong for a trial judge to give the charge requested, but it is not error to refuse it. And we do not change that rule." At 325. (Footnote citing Unites States v. Remington, 191 F.2d 246, 250 (2d Cir. 1951), omitted).

through Eight charge a scheme and artifice to defraud and Count Nine charges a conspiracy. Only Count Two charging untrue statements of fact in the registration statement is in any way parallel to the charge in Natelli. Even in Count Two the parallel is far from complete. In this case the incorporation of the paragraphs of Count One into Count Two bring into Count Two the unified scheme of the fraud and is thus unlike the disparate and separable false statements charged in Natelli.

It is unquestionable that the crime in a conspiracy charge is the agreement. The jurors must be unanimous in deciding that the defendant under consideration entered the conspiratorial agreement. When the jury is properly instructed as to the nature of the agreement which must be shown, and an overt act is proven, it is not necessary for the Government to prove more. The Government need not specify the particular means by which the agreement was carried out or demonstrate that all the defendants agreed on particular means and methods of the conspiracy.

United States v. Finkelstein, 526 F.2d 517 (2d Cir.1975); United States v. Gersh, 328 F.2d 460, 462 (2d Cir), cert. denied, 377 U.S. 992 (1964). The opinions of individual jurors as to matters which are not essential to the proof of the crime are of no matter.

Analogously, in the counts charging a scheme or

artifice to defraud the Government must only prove, on the basis of the evidence against a defendant taken as a whole, that he devised or intended to devise such a scheme or artifice. Under a proper charge, the jurors must agree that the totality of the evidence in the case supports the decision that the defendant being considered devised or intended to devise the scheme. It is not necessary for the jurors' minds to meet on more than that and if different jurors gave different weight to various parts of the evidence that it is irrelevant to the unanimity of their verdict, so long as they agree on the essential elements of the crime.

For example, the indictment for a bank robbery conspiracy may charge that defendant A and B entered the bank, B and C drove the get-away cars and A and C later possessed the stolen funds with each event set out as a means to the conspiratorial end. The evidence may come in through photographs and a variety of eye witnesses and circumstantial evidence as to possession of bait money. The jurors may gave differing weight to different parts of the evidence but so long as all agree beyond a reasonable doubt that each defendant engaged in robbing the bank it does not matter that some are not persuaded beyond a reasonable doubt by bank photos while others place little weight on eye witnesses

or the accuracy of bank records as to bait money. The jury decides the ultimate facts and is not invited to decide more. Where, as here, the acts charged are part of a single unitary scheme only a general verdict is proper. On a count fairly given to the jury, passing beyond the general verdict of guilty or not guilty amounts to a request for a special verdict which is improper and erroneous. United States v. Adcock, 447 F.2d 1337 (2d Cir.) cert. denied, 404 U.S. 939 (1971); United States v. Spock, 416 F.2d 165, 180-183 (1st Cir. 1969).

In addition, under Pinkerton v. United States, 328 U.S. 640 (1946), a defendant convicted of conspiracy may be found guilty of the crimes of co-conspirators committed in furtherance of the conspiracy. Thus in the present case a defendant convicted on the conspiracy count could be convicted on any other count if the jury found either that he had committed it himself or that another defendant committed it in furtherance of the conspiracy. The Government has already requested the Court to charge the jury under the principles of Pinkerton (Request No. 23). Withdrawal of particular paragraphs from jury consideration requiring unanimity as to individual paragraphs on Counts One and Three through Nine would be improper.

Turning to Count Two, the Government contends

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that the requirements of Natelli are met if a Pinkerton charge is given and the jury is additionally instructed that where it finds a defendant ^dguilty directly of the substantive crime and not under the principles of Pinkerton it must ^{be} unanimous as to at least one untrue statement of material fact specified in Count One and incorporated into Count Two.

Taking the nature of the indictment in this case, there is not ^hbasis under Natelli to require unanimity of the jurors as to particular paragraphs of Count One as they appear in that Count or in Counts Three through Nine. Considering both the principles of Pinkerton and the evidence of the case, there is no basis to withdraw from the jury's consideration any of the charges of untrue statements of material fact on which Count Two rests. Under Natelli there is ground to instruct the jury under Pinkerton and to charge that in reaching a guilty verdict for the direct substantive violation of Count Two, the jurors must be unanimous as to the guilt of the defendant

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being considered on at least one of the specified untrue statements incorporated into that Count. Suggested instructions on this issue are attached.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

W. CULLEN MacDONALD
ANGUS MacBETH
Assistant United States Attorneys

- Of Counsel -

1 jpa5

2 ing with Mr. William Stirling. He said he had a
3 conversation with David Stirling.

4 I think, your Honor, when you look and
5 recite the evidence that Mr. Macbeth just recited against
6 William Stirling against the evidence when taken as
7 a whole, I think that the test has been met so that
8 Mr. William Stirling is not a defendant subject to
9 review by this jury under that test.

10 THE COURT: I think, considering the things
11 Mr. MacBeth has reviewed and having in mind the position
12 of Mr. William Stirling in the corporation, there is
13 a jury question as I see it now.

14 The motion, although it is certainly not
15 frivolous, is denied.

16 Mr. Feldshuh?

17 MR. FELDSHUH: For the record, your Honor,
18 pursuant to Rule 29, I respectfully move for a judgment
19 of acquittal as to the defendant Harold M. Yanowitch.

20 THE COURT: All right. It is denied,
21 for the record.

22 MR. EATON: Your Honor, I'd like to make
23 my motion specifically paragraph by paragraph in this
24 indictment and I would like your Honor to treat these
25 as separate motions to dismiss --

Tr. 3570 15, 11
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1 jpa6

2 THE COURT: Different counts? I am
3 not going to dismiss paragraphs. If you want to move
4 against specific counts you may, but I won't let you
5 go paragraph by paragraph by paragraph. There are
6 a lot of paragraphs here and we don't acquit people by para-
7 graphs.

8 MR. EATON: I may be stating the motion
9 in the wrong form, your Honor, but what I am thinking
10 of specifically is the Natelli case, where there was
11 a big discussion in the Court of Appeals about whether
12 there was sufficient evidence on part of the case and
13 whether the jury could have been told that as to
14 part of the case they could not convict co-defendant
15 Scancorole on part. I am asking for that same sort
16 of relief for Mr. Schulz on certain parts of the
17 alleged scheme.

18 THE COURT: If you are asking for relief
19 now in the form of things to be told to the jury, then
20 this is the wrong time to do it. I am hearing motions
21 to acquit, not applications for instructions. It
22 will be time enough when the case goes to the jury,
23 if there are such exclusions to be put before them,
24 to do it then. You advise me before then of what
25 things you want done then.

jpa7

1 MR. EATON: I will do that. But my
2
3 understanding is, your Honor, if there is insufficient
4 evidence on the part of the conspiracy at this point,
5 Mr. Schulz should not be required to put on any defense
6 as to those parts of the scheme.

7 THE COURT: I don't grant rule 29 motions
8 as to parts. I don't have a view on whether he's in-
9 volved in parts. Every defendant is not involved
10 in parts of this indictment, or almost every. I am
11 not going to rule on which paragraph does or does not
12 embrace which defendant at this time. I don't think
13 that's the office of a motion to acquit.

14 I will hear your Rule 29 motion and not
15 by paragraphs. That's the ruling. If it is
16 erroneous, I think I have made the error as clear as you
17 could possibly meet it to do.

18 MR. EATON: I am interested in making
19 that clear, your Honor. When I said parts, I was
20 referring to count 1, paragraphs 10 through 16 indi-
21 vidually, and to count 9, paragraph 2 individually.
22 I would have wanted to make separate motions as to
23 each of those paragraphs and your Honor has denied that.

24 THE COURT: I have foreclosed you from
25 hearing that, unless the government has an interest in

1 jpa8

2 seeing that I don't make too many mistakes.

3 MR. MAC DONALD: No, sir. The Natelli
4 charge in issue had nothing to do with the scheme in
5 count 1 or the conspiracy in count 2.

6 MR. EATON: I would move simply, your
7 Honor, for judgment of acquittal on each and every count
8 as to Mr. Schulz.

9 THE COURT: That's denied. I'm sure
10 I meant very seriously what I said to you. If you
11 have specific instructions you want given to the jury
12 I will consider them very carefully, and you better
13 start preparing them if they are not already prepared.

14 All right, Mr. Mukasey.

15 MR. MUKASEY: Your Honor, I move also
16 for a judgment of acquittal pursuant to rule 29, and
17 to move as well on the basis cited by Mr. Eaton for --
18 well, for excision essentially from the indictment of
19 those paragraphs in which Mr. Phillips is not mentioned
20 which are set forth in the motion for a severance as
21 a grounds for severance, to have those paragraphs
22 excised as to him.

23 THE COURT: Okay. That's denied.

24 Now, what's your first step, Mr. Gaynor,
25 are you going to start with the movie?

1 jpa

2 mind, your Honor. We have Frank and Booth, both of
3 whom swore -- admittedly swore falsely, according to
4 them, and I want to insure that the fact that they
5 swore falsely, since both of them stated that Mr.
6 Yanowitch did not have any knowledge of either their
7 appearing before the grand jury or their swearing
8 falsely or intending to swear falsely, that that
9 fact requires I believe, in order to be fair, a direction
10 that under those circumstances the so-called false
11 swearing of them must not fall upon Mr. Yanowitch, not
12 as to substance.

13 THE COURT: I understand that. I won't
14 give that. You may argue it to the jury but that
15 gets into sticky factual things on which there could
16 be debate. You may argue it. I don't think the
17 average juror would think that X lies before the
18 grand jury that ipso facto shows something about Y,
19 unless there is some evidence of Y's possible partici-
20 pation. I deny that.

21 Then I have David Stirling's supplemental
22 request on Nateli, which is denied.

23 A supplemental Nateli request on behalf
24 of Harold Yanowitch, which is denied.

25 All these more extensive materials relating

1 jpa

2 to Mr. Schulz and Mr. Phillips concerned with this Nateli
3 problem, having gone through all that material and the
4 the government's memorandum, I have concluded that the
5 government's position on the Nateli thing is correct.
6 and that the particular kind of reference to specifica-
7 tions of falsity that Nateli seems to require or favor
8 should be given with respect to count 2 and not
9 otherwise.

10 Now, I will from time to time try to
11 remind the jury that they have to look at each
12 individual defendant and be aware of the fact that, even
13 in the terms of the indictment, certain defendants
14 are not even charged in connection with certain transac-
15 tions. I think that applies to Mr. Phillips and
16 Mr. Schulz, I guess perhaps only to them, and you all
17 know which paragraphs that thought relates to.
18 I won't mention any.

19 I will tell the jury to focus on the issues.
20 That Mr. Schulz is not involved, by and large, with
21 the Greater Gulf Coast business and that he and Mr.
22 Phillips, or both, are not involved, according to
23 the indictment or the evidence, with the union business,
24 if I remember correctly.

25 But as far as charging the requirement

1 jpa

2 of unanimity with respect to the particular specifica-
3 tion is concerned, I think the government is right and
4 that really squarely only comes up in coun 2 of the
5 indictment. I will try to deal with it in that con-
6 nection.

7 Now, there is one problem about the
8 length or bulkiness or cumbersomeness of the charge in
9 this respect. I suppose you could make a fairly
10 long list of specifications under count 2, if you took
11 all of the defendants into account. What I think I
12 will try to do, just to give you guidance for your summa-
13 tions, is mention three or four as illustrative and let
14 you work your arguments into the charge with that
15 forewarning, unless somebody thinks on either side
16 that that is an unfair and insufficient way to
17 handle it. I don't hear any complaints. I think
18 I will do it that way. Let's see how it comes out.

19 MR. EATON: Your Honor, when you say
20 three or four specifications, are you thinking in
21 terms of one, land sales; two, Greater Gulf; three,
22 union; are you thinking along those lines?

23 THE COURT: Well, I haven't really
24 finished thinking about it. I want to reexamine both
25 the bill of particulars and the evidence.

1 jpa

2 How is it set up in the bill of particu-
3 lars?

4 MR. EATON: I really don't think the bill
5 of particulars is helpful at all, your Honor. It is
6 a massive list of hundreds of numbers that were wrong
7 and it didn't come out in this case. I think the
8 better guideline is paragraphs 10 through 16 of the
9 indictment.

10 THE COURT: What does the government
11 think about that?

12 MR. MAC DONALD: We are in general agree-
13 ment that those examples drawn from those 10 through
14 16 would focus the jury's attention on this subject.

15 THE COURT: All right, let me see if I
16 can try that.

17 Now, I have some questions and after a
18 while we will get through.

19 Mr. Gaynor's question about no inference
20 from a defendant's failure to take the stand, is that
21 wanted?

22 MR. GAYNOR: Yes, your Honor.

23 MR. EATON: It is desired by Mr. Schulz
24 as well, your Honor. I might say that I would like
25 some language specifically stating that in the course

1 jpa

2 of their deliberations the jurors should not discuss
3 that subject or give it any weight.

4 THE COURT: Well, I'll tell them it should
5 not play any part in their deliberations.

6 MR. EATON: That's good. I would like
7 that word "deliberations" in there, your Honor. I
8 think that focuses it.

9 THE COURT: In return let me unnecessarily
10 mention that in the last year or two I have seen a new
11 fashion, that I trust will die in its cradle, of defense
12 counsel informing the jury that it was his decision that
13 his defendant should not take the stand. I frequently
14 forget to tell people. But if anybody does that I
15 will stop him, because of course that's not fair or
16 correct, and I assume none of you will do that.

17 I take it the position has not changed on
18 the business of marshaling the evidence. Nobody
19 has decided --

20 MR. GAYNOR: My position has not changed,
21 Judge.

22 THE COURT: Since I have not heard from
23 anybody I will not give a summation of my own but
24 simply run through the paragraphs and try to remind them
25 of what the issues were.

jpa

a promise to get him out within a year, and a year and a half went by. Yanowitch said he made that promise but he had problems with the high-rise project and he wished the guys would be more patient and why are they walking away from the deal.

Then he put on the hard sell, "Mr. Garrity and Mr. Frank, for old time's sake we will put enough modules on it and we will give you enough legal business so it is enough for you to make payments on the 40,000 to bring the little thing current."

Mr. Frank agrees.

March 8th, memorandum, Schulz to Yanowitch, copies to David Stirling and William Stirling. This is a week now after it has been back in Rochester and the first copy was sent out to Mauriello. Schulz tells Dienstag, and Dienstag testified that he had gone to Schulz and talked to him about any big jobs, anything more than 10 per cent you have to disclose in the registration statement. Schulz wrote, "I also informed Dienstag of Greater Gulf Coast 4300 units. I mentioned the Farmers Home Administration as being the ultimate source of funds, but suggested he," Dienstag, "discuss this with you before disclosing it to any outside parties."

tpa

Here is the first piece of paper which shows the specific secrecy attendant on that document up at Avon, New York. Mr. Dienstag testified he went to Yanowitch and talked about it. Yanowitch said, "Any questions, you send them to me. Make no mention of it. It is a highly political and very sensitive matter."

March 12, 1971, Professor Mauriello gets a phone call. "Come on up to Avon, bring with you what you are working on in the way of an opinion on this Greater Gulf Coast thing."

He gets there and he goes in to meet Mr. Yanowitch, and Mr. Yanowitch says, "Could you scratch out all references to a February 21, 1971 letter? Here is the letter dated February 22, 1971. We don't really need to specify in your opinion, Mr. Mauriello, such a letter."

Mauriello says okay. This is his scratching out, and the next edition of this shows it is gone and some sort of salty, general language and nothing quite as specific as the February 21 letter. This very piece of paper contains Mauriello's handwriting and Mauriello testified after he agreed to scratch it out Yanowitch said to him, "By the way,

1 jpa7

2 hired. Mr. Schulz wrote a memorandum and read
3 Professor Mauriello's incoming memorandum and at no
4 point does he disclose in any of these dealings that
5 there are concurrent loans to purchaser, back for financ-
6 ing. You will have to decide whether or not, in
7 his position as controller attending meeting after
8 meeting after meeting he deliberately closed his eyes
9 to the answers to those nine questions and didn't look
10 at Mr. Yanowitch or Mr. Stirling in preparation for
11 any of those meetints and said, "What about items 1, 2,
12 up to 9? We flunked 1 and 2. Are we okay on 3
13 through 8?"

14 A controller in America has an obligation,
15 at least when he has that piece of paper rubbed in his
16 nose, to answer those questions before he signs a
17 registration statement. You may find that he knew
18 the facts with respect to the backboard financing on
19 that transaction. You may find when there are let-
20 ters being sent out assigning assets, when there are
21 deposits of \$100,000 and that's a reduction in the cash
22 account and an increase in a different bank, that the
23 controller of a corporation knows where the \$100,000
24 went.

25 There is a sufficient basis for you to find

1 jpa8

2 that Mr. Schulz had actual knowledge of the 57-31
3 transaction and participated in misrepresenting it to
4 the reader of the prospectus.

5 Now, Mr. Eaton, because of the strictures
6 of time, and I'm worried about the same thing, neglected
7 to mention Mr. Schulz' own memorandum with regard to
8 the Mississippi project and the Greater Gulf project.
9 He didn't have anything to do with that.

10 He wrote the memorandum to Mr. Yanowitch
11 saying, "Dienstag and I have discussed it and I
12 have told Dienstag not to mention it to any outsiders
13 without checking it with you." That didn't depend
14 upon anybody's credibility, that is Mr. Schulz' own
15 pen again. That is his notation of the secrecy attend-
16 ant on that letter.

17 Mr. Schulz didn't sign a travel and expense
18 voucher on January 11, '71 to make up and it is now
19 obscured, the first \$11,500 deposit. He did sign
20 and you may look at them and use the chart as a guide,
21 several of the check requests approving the generation
22 of that labor cash in the February, April and April
23 later deposits. His pen doesn't depend upon the
24 credibility of anyone.

25 One thing about quoting Mr. Rumley's answer

1 csl5

2 THE COURT: What do you say to that, Mr.

3 MacDonald?

4 MR. MacDONALD: My recollection, and I'm
5 trying to remember the context in which the remark was
6 made -- remember that the question was not answered.
7 I think that my summation was fair comment on the evidence
8 with respect to Schulz having volunteered the hold over-
9 run problem to Peat, Marwick or whether or not the record
10 is silent with respect to whether that was found out by
11 the man who was assigned or whether or not Schulz
12 volunteered it.

13 THE COURT: All right, let's go on.

14 MR. EATON: My second one, your Honor, is that
15 for the first time Mr. MacDonald raised the question of
16 bank balances as providing some sort of knowledge in 1971
17 to Mr. Schulz' back-door findings. The record is clear
18 on that. Mr. Kuveke said that starting in the fall of
19 1970 he kept track of the bank balances in his own
20 office.

21 THE COURT: What is wrong with what Mr.
22 MacDonald said?

23 MR. EATON: Mr. MacDonald said -- the first time
24 did not make this argument at all.

25 THE COURT: I understand. Is it that he

1 csl6

2 didn't make it originally?

3 MR. EATON: Plus the fact that it is a mis-
4 statement of the record. He said Schulz had the bank
5 balances. It was Mr. Kuveke.

6 THE COURT: I don't think that is inconsistent.
7 Are you claiming that Schulz didn't have
8 them?

9 MR. EATON: The third objection, your Honor,
10 is that Mr. MacDonald directly accused me of misstating
11 the record with respect to the two computer specialists
12 from Peat Marwick. He said that I misstated the record
13 when I said that Peat Marwick knew about File 1 and File 2.
14 The record on that is at 4822 of the transcript where I
15 asked Mr. Woods:

16 "Q Do you know if either of them --
17 Kurzwanski or Sackinary -- reviewed the computer
18 which related to modular inventory control at
19 Stirling Homex?

20 "A I believe that a part of their review,
21 yes. They redviwed other areas also."

22 THE COURT: That doesn't tell me that they
23 knew it too.

24 MR. EATON: But it doesn't mean that I mis-
25 stated the record.

Specifically, the indictment charges, with respect to one sale that you will recall involving Mr. Peter Thun and another sale to a corporation called Raseac Associates, that both sales involved artificial prices and certain side promises and agreements given to the buyers, including assurances that they would be guaranteed against any losses.

It charges further that these sales involved minimal down payments with postponement of the obligation to pay the remainder of the purchase price for long periods. It is charged that the sales were to financially weak corporations that could not have paid the purchase price and should not have been expected to be able to pay the purchase price, so that the profit being reported, or the income, the price, being reported for 1969 should have been known and must have been known to be unreal and very unlikely ever to be realized.

On the particular charges in that paragraph 10, and on all the charges throughout the allegations of this indictment, the defendants flatly deny the accusations against them. Insofar as prosecution witnesses have testified to facts that appear to support those accusations, the defendants contend,

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1 among other things, that at least many of those wit-
2 nesses must have testified falsely for reasons of
3 their own, such as a hope for freedom for themselves from
4 prosecution by providing these defendants as targets
5 for prosecution instead of themselves. More
6 specifically and affirmatively on the charges in
7 paragraph 10, the defendants argue that the sales were
8 essentially normal types of transactions, that the
9 prices were not artificial, that the down payment ar-
10 rangements were within the range of normal and customary
11 deals of this nature, that the use of shell corpora-
12 tions was likewise a normal and typical practice that
13 involved nothing wrongful and no deception or fraud of
14 any kind.
15

16 As to the allegations and testimony of
17 witnesses that there were guarantees against loss, the
18 defense testimony has been that those charges and that
19 testimony are absolutely false.

20 Paragraph 11 goes on to deal with the
21 same 1969 land sale and the same four defendants, and
22 charges them with wrongdoing, with deception in docu-
23 ments filed with the SEC and other documents
24 distributed to shareholders which omitted to disclose
25 that the land sales were not in fact being consummated,

1 11cs 41

2 but if you say to somebody: "That is the door to the
3 bedroom," and that is true, but you omit that the floor
4 has been removed from the space inside that door, that
5 would be a very material omission. The person walking
6 through might get killed. What you said is true,
7 "That is the door to the bedroom," and so all this language--
8 I hope that example has nothing to do with the case, and I
9 can't see how it has anything to do with the case -- all
10 that language about material omissions relates to that
11 situation where what was said was true, but when you
12 extended it what was left out was a material omission
13 necessary so that the person to whom the communication
14 was given would get the kind of truthful communication
15 you were purporting to give and he or she was expecting
16 to receive.

17 Now, the paragraphs that we went through from
18 10 through 16 enumerate the various kinds of material
19 misstatements and material omissions charged in this
20 case.

21 I instruct you for purposes of Count 1, the
22 count we are now on, that the Government, if it proves
23 the other elements, ^{not} is now required to prove every misrep-
24 resentation or omission it alleges. It would be suf-
25 ficient, if the other elements are established, to convict

on Count 1 if the Government proves beyond a reasonable doubt that at least one of the misrepresentations or omissions was made in furtherance of the scheme to defraud.

In addition, I stress to you the things the Government must prove, but it is also meaningful to tell you the things that are not necessary to be proved. I tell you it is not necessary for the Government to establish that any particular person relied on or suffered damage as a consequence of any false statements or omissions of material facts. It is enough if you find in this respect that false statements or statements omitting material facts were made as a part of the fraudulent scheme in the expectation that they would be relied upon.

Now, at the same time as a matter of simple, common sense, which is your main asset, I might say, in this case, you will understand that if you find evidence that the allegedly false statements were relied upon and they were effective, this may be considered by you in determining whether a fraudulent scheme or device of the kind alleged has actually been established by the proof in this case.

I have used the words material and materiality repeatedly, as the indictment does, in describing the

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as a question, is this: We had asked whether the court was going to instruct the jury, I think we asked by letter, on character evidence possibly giving rise to a reasonable doubt. I don't recall covering, whether we covered that issue in discussing it before.

THE COURT: No, you did not. I am glad you reminded me. I have left it out. So I will put it in.

MR. MUKASEY: Thank you, your Honor.

MR. GAYNOR: Your Honor, I did read, of course, the proposed charge on reliance, but as I listened to your Honor it occurred to me that perhaps your Honor would consider adding something to there which I have drafted and it is very short. May I read it?

THE COURT: No. I mean the short answer is no. The longer answer is no, thank you. I am sorry, but there comes a point where I won't do that.

MR. EATON: Your Honor, I took serious objection when you were discussing paragraph 10 and later paragraph 12. You said the defendants, meaning all four that are talked about in those land sales, contend that the witnesses must have testified

1 jpa 62

2 falsely.

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3 THE COURT: I said at least many of
4 them for the sake of modifying Mr. Feldshuh's request,
5 which I granted, which seemed to refer to all of
6 them.

7 But what's your problem?

8 MR. EATON: Mr. Schulz makes no such
9 contention that any of those people, Barbato, Frank,
10 etc., were testifying falsely. His contention is
11 very simple, that those witnesses did not mention and
12 there is no proof that Mr. Schulz knew of any of the
13 alleged side deals and credibility --

14 THE COURT: If you didn't make that posi-
15 tion clear, I am sorry. I can't take each defendant
16 and point him to the issue and say he argues this and
17 he argues that. I understand your exception and
18 I deny it.

19 Anything else?

20 MR. FELDSHUH: As to the collectibility,
21 I think your Honor did make some point as to assur-
22 ance of collection of the amount and the accounting
23 stipulation with which I agree. I was just wondering,
24 your Honor, as one of the facts as to which there is
25 no dispute, namely, that the prospectus of Merrill

STATE OF NEW YORK
COUNTY OF NEW YORK SS.:

DOUGLAS F. EATON, being duly sworn, says:

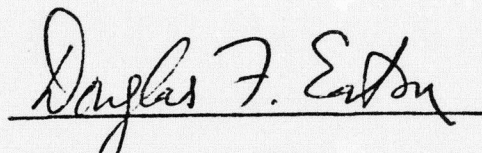
1. On May 9, 1977, I served a copy of the Brief for Appellant Edwin J. Schulz and a copy of the Appendix to said Brief on each of the attorneys for the other parties, as follows:

A. I served the United States Attorney's Office and Patterson, Belknap, Webb & Tyler by hand.

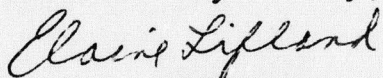
B. I served the following attorneys by mail:

Ford Marrin Esposito Witmeyer & Bergman
25 Broadway
New York, N. Y. 10004

Hawkins Delafield & Wood
67 Wall Street
New York, N. Y. 10005


DOUGLAS F. EATON

Sworn to before me
this 9th day of May, 1977



ELAINE LIFLAND
Notary Public, State of New York
No. 24-4640450
Qualified in Kings County
Commission Expires March 30, 1979

